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Supreme Court, U.S.
FILED

No. _____

06-529 OCT 16 2006

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In The

Supreme Court of the United States

DOROTHY JONES, as personal representative of the estate of Denise Michelle Jones, deceased,

Petitioner,

v.

WILLIAM KISH, III; Joseph Lavis; Douglas Muncey; and Mohamed Nasser,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Decide the legal dispute between the Sixth Circuit and the Second, Fourth, and Ninth Circuits over whether words and presence of police officers facilitating crimes is sufficient to constitute affirmative state action under the Fourteenth Amendment Substantive Due Process Clause in a 42 U.S.C. § 1983 claim?

2. Whether a Fourteenth Amendment Substantive Due Process claim brought under 42 U.S.C. § 1983, in determining if affirmative state action exists, in a situation where police officers are actively engaged in criminal participation with private persons, should not the 42 U.S.C. § 1983 claim be analyzed against the backdrop of general common law tort principles and the definition of "under color of" law?

3. Whether the affirmative defense of assumption of risk, a legal issue of first impression in this Court and Federal Circuit Courts, is a viable defense to a claim brought under 42 U.S.C. § 1983, involving the criminal participation of police officers with private persons, directly causing death.

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OPINION BELOW

The Sixth Circuit Court of Appeals published its opinion reported at 438 F.3d 685 (6th Cir. 2006). A petition for rehearing and en banc hearing was denied on May 18, 2006. The District Court did not publish an opinion in this case. Its written opinion is reprinted in the Appendix at 1-41.

JURISDICTION

The Sixth Circuit filed its decision on February 17, 2006, and entered an order denying petitioner's motion for en banc and rehearing on May 18, 2006. App. 71-72. Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including October 16, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that "... *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law*; ...." The pertinent provision of the Civil Rights statute, 42 U.S.C. § 1983, provides in relevant part:

> "Every person who, *under color of* any *statute, ordinance, regulation, custom, or usage*, of any State *or* Territory, *subjects, or causes to be subjected*, any citizen of the United States or other person within the jurisdiction thereof to the *deprivation of any rights*, privileges, or immunities *secured by the Constitution and laws, shall be*

liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF FACTS

On October 8, 2001, the decedent, Denise M. Jones, was dismembered and subsequently died, as direct result of an illegal drag race involving the Respondent police officers. The Respondents were more than mere spectators of the drag race. The Lincoln Park on duty police officers, Nasser and Muncey, had gone out of their jurisdiction into the City of Detroit at midnight, and participated in the planning and preparation taking place for the illegal drag race. The Respondents actively participated in the illegal drag race. Reynolds, one of the two drag race drivers, was going to abandon the drag race because he feared he would be arrested, but the respondent officers told him they wanted to see the drag race. The drag race had a substantial purse payable to the winner, and illegal wagers were being placed. The Respondents are liable for their knowing and intentional participation in the illegal drag race. Officers Muncey and Nasser could not have planned their return to the scene any better, when later that evening, approximately one hour before the drag race began they returned. Shortly after their arrival for the second time, officers Muncey and Nasser were accompanied by on-duty police officers Kish III and Lavis. If the officers had not facilitated the illegal activity at the scene, the race would have been cancelled. Their liability is not restricted to a theory of failure to act because they also happen to be police officers, with the affirmative duty to enforce and uphold the law. The officers overtly showed they conscientiously had a common plan and design with the drag race drivers. According to an eyewitness, "[e]verybody was

fittin' to leave because they [saw] the police." Indeed, some vehicles drove away soon after the officers' arrival. The fact that the Respondents are police officers is an exacerbating factor – not a mitigating factor. Moreover, Reynolds, the driver of the car that struck Jones, "was afraid to race when the Lincoln Park Police first drove up" for fear of being arrested, so he "was in the process of putting [his] car back into the trailer,.to call off the race." "[T]hey [were] about to pack up and leave." The Respondents actual involvement in the drag race, to the extent that music was played, bets were placed and authorization and disclaimer of action was broadcast, is totally different than the mere failure to take action or negligence in taking inappropriate action.

Of course, the race was not called off. At least one officer – apparently Officer Mohamed Nasser ("Officer Nasser") – briefly spoke to Reynolds and the other drag racer, Mustapha Atat ("Atat"). Officer Nasser told Reynolds that the officers "want[ed] to see the race." On the way back to his vehicle, Officer Nasser was seen placing a wager on the drag race. Officer Nasser returned to his cruiser, "got on his loud speaker[,]" and said, "We're not here to arrest anyone, go ahead." "[W]e were told by the Lincoln Park Police to go ahead with the race." Officer Douglas Muncey played rap music over a loudspeaker before the race began. In response to the music, the crowd "got hyper" and "everybody start[ed] hollering and . . . dancing." The participation of Respondent Police Officers in the illegal drag race actually sanctioned the event by lending a badge of legitimacy to the criminal endeavor. Who does not feel more secure at an event with the presence of licensed uniformed police officers being present? Needless to say, an intervention by citizens to challenge

this drag race is much less likely to occur with such a visible display of protection and sponsorship (uniformed police officers in marked scout cars). Indeed, Reynolds attested, "I would not have raced if the police officers had not told me that we could go ahead and race." The presence, assistance, and encouragement of the Respondents bestowed security and authenticity to the event. Moreover, the condoning presence of uniformed police officers during criminal activity is more than inaction. Without such solid encouragement to the lethal drivers there would not have been a drag race. The Respondents' involvement lent credibility to the criminal enterprise (drag race), similar to a Chief of Police associating with a Mafia Don.

Although a police officer would be accorded qualified immunity while participating in a raid on an illegal gambling and drinking establishment, there would be no immunity for a police officer, who was actually a patron of the illegal establishment. Even more so there would be no immunity for a police officer, like in this case, who was providing security and support to the blind pig while in uniform! This case involves the abuse of authority. The respondent Police Officers were not simply inattentive; they were instrumental in the maintenance of the illegal drag race. The officers initiated the race and the decedent was killed as a result. Criminal charges were filed against the officers by the State.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS – AND THE SIXTH CIRCUIT'S LEGAL DECISION BASED UPON "STATE CREATED DANGER DOCTRINE" IS INCONSISTENT WITH DECISIONS OF THE SECOND, FOURTH, NINTH FEDERAL CIRCUITS AND COMMON LAW TORT PRINCIPLES WHICH HAVE FOUND WORDS AND PRESENCE, OF STATE OFFICIALS, FACILITATING ILLEGAL ACTIVITY, TO CONSTITUTE AFFIRMATIVE STATE ACTION.

This Court is requested to resolve a legal dispute among the Federal Circuit Courts, in the context of 42 U.S.C. § 1983 claim, over whether words and presence of police officers facilitating illegal activity is legally sufficient to constitute affirmative state action under the Fourteenth Amendment's substantive due process clause. The Sixth Circuit's decision is inconsistent with other Federal Circuits that have found verbal statements and presence of state actors to legally constitute affirmative state action – The Sixth Circuit held **"All things considered, Jones "cannot show" what our cases require – "that defendant officers created or increased the risk that [Jones would be struck by a vehicle]"** *Cartwright*, 336 F.3d at 493. **Because Jones has failed to establish a cognizable "affirmative act," we must reject her claim against the officers as a matter of law."** App. 19-20. Thus, there is no dispute over the facts that the police officers facilitated, authorized and endorsed this illegal drag race. The Sixth Circuit accepted as true the factual basis of Petitioner's claim that the officers facilitated, authorized and endorsed the illegal drag race:

App. at 15: ***"[E]ven if an officer bet on the drag race, as one spectator alleges, and even if the officers played rap music for 15 minutes rather than 2 minutes, as other spectators allege, that does not change matters. While such conduct certainly would not have discouraged the participants from proceeding with the race, it also cannot be said that it placed the drivers or spectators in greater danger than if the police had never arrived."*** The Sixth Circuit further states: ***"By allegedly choosing not to stop the race and by allegedly saying to the drivers that they "could go ahead and race," JA 1042, the officers [acted] irresponsibly . . . "*** App. 18. (Emphasis added). And, ***"[B]ut by expressly allowing the about-to-begin race to proceed, if not encouraging it to proceed, the officers gave law enforcement a bad name."*** App. 24. ***"The Lincoln Park police officers behaved exceedingly badly."*** App. 24.

If this Court resolves the legal question that words and presence are legally sufficient for affirmative state action, the Sixth Circuit's "state created danger doctrine" would find the police officers' illegal conduct increased or created the danger that directly killed Jones. The legal question about whether words and presence, facilitating illegal activity, is the kind of conduct legally sufficient to constitute affirmative state action is where the Federal Circuits are split. Each of the Federal Circuit Courts involved in this legal dispute have adopted the "state created danger doctrine."

As stated by Chief Justice John Marshall in *Marbury v. Madison*, – "It is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. (1 Cranch) 137, 177 (1803). *The Petitioner does not claim the Respondent police officers had a duty to protect her under*

the Fourteenth Amendment. This is not a "positive liberties" case, like *DeShaney, infra*, where the question was whether the Constitution entitles a child to governmental protection against physical abuse by his parents or by other private persons not acting under the direction of the state. The Sixth Circuit's decision is inconsistent with the affirmative protection afforded by the Fourteenth Amendment, and the case law interpreting 42 U.S.C. § 1983, in the context of the *restraint imposed on the government to act illegally.*

The illegal facilitation of a crime by on-duty uniformed police officers, through their conduct (placing an illegal wager on the drag race), words (informing the drag race drivers they were not there to arrest anyone and could go ahead with the illegal drag race that was otherwise going to be abandoned by Reynolds) and their physical presence (at the time of the race and two hours before the illegal drag race occurred) constitutes "affirmative state action." *See* App. 26-28. Here, the Lincoln Park Police Officers were present at every stage of the illegal drag race and informed the drag racers to "go ahead with the race." The embraced words *"we're not here to arrest anyone, go ahead with the race" directly incited lawlessness and caused the acts of violence by the persons to whom the remarks were addressed.*

This case is distinguishable from *DeShaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189 (1989), where the appellant claimed that respondents had deprived Joshua of his liberty without due process of law, in violation of his rights under the Fourteenth Amendment, by failing to intervene to protect him against a risk of violence at his father's hands of which they knew or should have known. This Court held that the Fourteenth Amendment

did not impose a duty to protect and the "failure to protect" was not a cause of action under the substantive due process clause of the Fourteenth Amendment. *Noteworthy, the Petitioner in this case has never claimed the police officers failed to protect her or the Constitution creates a duty to protect.* In this case the Petitioner's claim is, the Constitution prohibits illegal governmental conduct that the officers engaged in. *The principal distinction between DeShaney's situation and that of the Petitioner is that Jones' death resulted from the active presence of the Respondent police officers aiding and abetting the very crime that killed her.* Indeed, *DeShaney*, does not preclude a claim when the state acted criminally in concert with private parties – "[T]he clause is phrased as a limitation on the State's power to act, not as guarantee of certain minimal levels of safety and security." The "state created danger doctrine" was spawned by this Court's statement in *DeShaney* that the "state played no part in their creation [of the danger to the little boy, Joshua] nor did it do anything to render him any more vulnerable to them," 489 U.S. at 201. *DeShaney* does not condone any kind of criminal conduct, whether by facilitation, conspiracy, concert of action or aiding and abetting the commission of a crime.

Respondents' illegal conduct is cognizable affirmative state action! *See* Criminal Statutes Violated – MCLA § 92.4 – Police officers; powers; duties. *See* 18 U.S.C. § 1955 Gambling. *See* MCLA § 257.626a – Drag Racing (Aiding and Abetting); MCLA 750.478.

The legal question before this Court – what kind of conduct constitutes cognizable affirmative state action? Where does *DeShaney* draw the line between affirmative action and inaction? Are words and presence of officers

facilitating illegal activity sufficient to constitute affirmative state action?

The Sixth Circuit's decision is inconsistent with other Federal Court of Appeals that have found words, presence, conspiring conduct, concert of action and aiding and abetting affirmative action legally sufficient to establish civil liability, in the context of Fourteenth Amendment liberty interest. As this case was being decided by the Sixth Circuit, the Ninth Circuit on March 7, 2006, in *Kimberly Kennedy v. City of Ridgefield, et al.*, 411 F.3d 1134 (9th Cir. 2006), held that a verbal promise by a state official to a victim that he would give the victim advance notice before contacting shooter about the victim's child molestation allegations against shooter, but failed to do so, and verbally assuring her that police would patrol the neighborhood after officer's contact, constituted affirmative state action. "Interpreting the facts in a light most favorable to Plaintiff, we conclude that Shields did in fact *augment* the danger Plaintiff and her husband faced and acted with deliberate indifference to a known or obvious danger" – *Id. Kimberly* at 1142-1143, pursuant to *DeShaney v. Winnebago County, supra.*

Prior to the Sixth Circuit's decision in this case, the Second Circuit was faced with virtually the same kind of police misconduct in *Dwares v. City of New York,* 985 F.2d 94 (2d Cir. 1993), and held that New York City police officers that verbally indicated to "skinheads" that they would not interfere if "skinheads" beat up demonstrators burning a flag, as long as it did not get out of control, such indication constituted state action. *Dwares* is viewed as an aiding and abetting and conspiracy case in the context of 42 U.S.C. § 1983. In *Reed v. Gardner*, 986 F.2d 1122 (7th Cir. 1993), the police created risk of danger by arresting sober driver and then let drunken passenger drive car and injured third party. The year before the *Jones* decision the

Fourth Circuit in *Meeker v. Edmundson*, 415 F.3d 317 (4th Cir. 2005), held that words by a high school coach that initiated and encouraged repeated beating of the student by other members of the wrestling team constituted state action. "Moreover, it is crystal clear that *if* Meeker can prove, as he alleges, that Coach Edmundson "*instituted, permitted, endorsed, encouraged, [and] facilitated*" the beatings, Edmundson *cannot escape liability simply because he did not administer the beatings with his own hands*." (emphasis added). Meeker at 322.

This Petition involves the legal restraint placed on government by the Fourteenth Amendment substantive Due Process Clause to preserve Jones' interest in life and freedom from bodily injury without Due Process of Law. However, in parallel situations, other Federal Circuits, in the context of Fourteenth Amendment interest in preserving property rights, have held words presence at a minimum to constitute affirmative state action. In *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983), the court held that if an officer is present at every stage of eviction and recommends that tenant leave premises, this created the impression that police sanctioned the eviction and state action is present. In this instance, the officers were present during the planning, preparation, and execution of the illegal drag race. In *Jones v. Gutschenritter*, 909 F.2d 1208 (8th Cir. 1990) the court held a police officer that accompanies landlord when he disconnects tenant's electrical service; jury question whether landlord acted under color of state law). In *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992), a registered nurse working at a medium security custodial institution was raped and terrorized by a young male inmate, and state action was found when her employer had verbally told her she would not be working

alone with violent sex offenders. In *Booker v. City of Atlanta*, 776 F.2d 272 (11th Cir. 1985), the court held that if police officer arrives with possessor, it could constitute "intervention and aid" sufficient to show state action. In *Greco v. Guss*, 775 F.2d 161 (7th Cir. 1986), the court held that deputies accompany landlord to serve distress warrant, state action present. In *Harris v. City of Rosenburg*, 664 F.2d 1121 (9th Cir. 1981), the court held that an officer actively assisted in repossession, state action was present. In *Soldal v. County of Cook*, 942 F.2d 1073 (7th Cir. 1991) (en banc), affirmed on other grounds, 113 S.Ct. 538 (1992), the court held that deputies stand-by while landlord disconnects mobile home from utilities to stop owners from opposing eviction, state action was present. In *Barrett v. Harwood*, 189 F.3d 297 (2d Cir. 1999), the court held that if an officer merely passively stands-by when property repossessed, no state action; but if takes active role, such as "intimidating or threatening debtor," then state action present. In *Munger v. City of Glasgow Police Dept.*, 227 F.3d 1082 (9th Cir. 2000), the police let drunken bar patron leave bar in T-shirt on very cold night; created danger that lead to his death. In *Snider v. Dylag*, 188 F.3d 51 (2d Cir. 1999), when the correction officer "told" other inmates that it was "open season" on plaintiff, valid section 1983 claim stated. In *Monfils v. Taylor*, 165 F.3d 511 (7th Cir. 1998), the police official released a tape of informant's voice, thereby allowing him to be identified and then killed by person he informed on; officer created risk and can be liable. In *Chavez v. Wagon Mound Public Schools*, 159 F.3d 1253 (10th Cir. 1998), the school authorities may have created danger by driving student home and failing to notify parents; student then committed suicide. In *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997), the police verbally ordered a woman to get in the truck with her boyfriend on pain of being arrested if she refused;

boyfriend later crashes truck and plaintiff seriously injured; police created unusual risk of harm and her substantive due process rights could have been violated. In *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996), court found affirmative action on the part of the police who led plaintiff's husband to leave his drunken wife unattended, and she was severely injured by anoxia after police left her intoxicated. The examples of affirmative state action are numerous and not quite as shocking as the officers here who actively facilitated the commission of crimes. The "state created danger doctrine" leads to inconsistencies, confusion, and unjustified decisions which defy logic, public policy, and common law principles of tort. Thus, this Court is called upon to decide the split among the Federal Circuits over whether words and presence of police officers facilitating illegal activity constitute affirmative state action in the context of Fourteenth Amendment substantive Due Process Clause claim – taking Jones' life without due process of law.

II. THIS COURT SHOULD MAKE A LEGAL DECISION TO RESOLVE THE CONFUSION AND INCONSISTENCY AMONG THE CIRCUITS ABOUT WHETHER A FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS CLAIM BROUGHT UNDER 42 U.S.C. § 1983 TO DETERMINE IF STATE ACTION EXISTS, IN A SITUATION WHERE POLICE OFFICERS ARE ACTIVELY ENGAGED IN CRIMINAL PARTICIPATION WITH PRIVATE PERSONS, THE PROPER LEGAL STANDARD IS THE "STATE CREATED DANGER DOCTRINE" OR GENERAL TORT PRINCIPLES AND "UNDER COLOR OF" LAW DEFINITION OF 42 U.S.C. § 1983.

This Court is requested to resolve the legal dispute and confusion among the Federal Circuits over whether the

"state created danger doctrine" or the common law tort principles and the "under color of law" definition of § 1983 is the proper legal standard to determine the existence of affirmative state action. The use of the state created danger doctrine has caused a split and confusion among the Federal Circuits over what legal standard must be used to determine affirmative state action. All Federal Circuits, including the Sixth Circuit, have adopted the state created danger doctrine since this Court's decision in *DeShaney, supra*. *See Kneip v. Tedder*, 95 F.3d 1199 (3d Cir. 1996); *Cartwright v. City of Marine*, 336 F.3d 487 (6th Cir. 2003). The "state created danger doctrine" was never implicitly or explicitly authorized by this Court. Nowhere in *DeShaney, supra*, does this Court explicitly or implicitly abrogate the federal common law tort principles previously authorized to analyze affirmative state action under § 1983, or overrule the holding of *Monroe v. Pape*, 365 U.S. 167 (1961). Instead, the Federal Circuit Courts have created their own version of the "state created danger doctrine" which has led to inconsistency. A § 1983 claim has been described as "a species of tort liability." *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). No Federal Circuit Court since *DeShaney* has utilized the backdrop of common law tort principles and the "under color of" law definition of § 1983 to determine the existence of affirmative state action. Further, the Federal Court's using the state created danger doctrine have unnecessarily developed and used the doctrine, over the established body of precedent by this court authorizing general common law tort principles and the meaning of "under color of" law contained in the language of § 1983 to analyze whether affirmative state action exits. A decision by this Court settling the dispute of Federal Circuits using "state created danger doctrine" versus using the general common law tort principles and the meaning of "under color of" law, would lead to consistency, uniformity, and clarity in the application of the law.

The Lincoln Park Police officers cannot show any authority under state law, state custom, or state usage to do what they did. In this case these policemen violated the Constitution, Federal Gambling law, and the laws of Michigan. Michigan law did not afford a remedy for their violation.

The pertinent text of the Fourteenth Amendment provides:

> "Section 1. . . . *"nor shall any State deprive any person of life, liberty, or property, without due process of law*; . . . ." (Emphasis added).

Unquestionably, petitioner's claim satisfies the three prerequisites of a valid due process claim: the respondent officers and drag race drivers acted under color of state law; the injuries of the appellants fall within the definition of life, liberty or property; and their losses, even though caused criminally, amounted to a deprivation. Petitioner contends that the police officers deprived Jones of her interest in life and freedom from bodily injury; *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 344 (1990); *See Ingraham v. Wright*, 430 U.S. 651, 673 (1977) (paddling student). Consistent with the U.S. Constitution, the Sixth Circuit previously held that an individual's "interest in preserving her life is one of constitutional dimension." *Nishiyama v. Dickson County*, 814 F.2d 277, 280 (6th Cir. 1987). Until now I had supposed that a man's life, liberty or property – with their essential incidents – were under the protection of our Constitution and not subordinate to whims or caprices or fanciful ideas of those who happen for the day to constitute the judicial majority. The Framers intended the Fourteenth Amendment to place a restraint on the States' power to affirmatively act without due process of law. Nowhere does the Fourteenth Amendment limit the restraint to physical action or written action.

But, there is no question that all incidents of the affirmative acts must be assessed and weighed with no one kind of action being more or less important than the other. *Indeed, the Fourteenth Amendment has found unconstitutional written words in legislation.* Nor does the Fourteenth Amendment contain any specific provision that either gives specific guidance on the term's meaning or suggests that construing words and presence to be affirmative acts would thwart the intent of the Framers or lead to absurd results. It would be illogical to limit the restraint on the States' power to affirmatively act to unlawful physical or written manifestations. States issue verbal and written orders which affect the rights of the people. But, it did strip the States of all power to deprive any person of life, liberty or property by arbitrary or oppressive action – such action is never due process of law. The police officers' words and presence cannot find protection from the First Amendment, applicable to the States by reason of the Fourteenth Amendment, *Torcaso v. Watkins*, 367 U.S. 488, 492-493 (1961), which prohibits government from inciting lawless action. The Fourteenth Amendment did not just place a restraint on the State power to physically act.

Furthermore, the Respondents acted criminally and the Petitioner is without an "adequate" state remedy because her state law claims were dismissed on State law immunity grounds, *cf. Hudson v. Palmer*, 468 U.S. 517, 534-536 (1984) (intentional destruction of inmate's property). By giving their authorization to the illegal drag race, the officers imbued the drag race with the authority of the State. Accordingly, the deprivation of liberty was without "due process of law," both because the police officers facilitated the illegal drag race and State law did not provide redress.

There can be no doubt at least since *Ex parte Virginia*, 100 U.S. 339, 346-347 (1880), that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it. *See Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278, 287-296 (1913). The question of whether Congress, in enacting the Civil Rights Act, meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position is well settled. *Williams v. United States*, 341 U.S. 97; *Screws v. United States*, 325 U.S. 91; *United States v. Classic*, 313 U.S. 299.

This Court's holding in *Adickes v. S.H. Kress & Co*, was more on point to the case at hand:

> *"The involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized, or lawful"*; *Monroe v. Pape*, 365 U.S. 167 (1961); *See United States v. Classic*, 313 U.S. 299, 326 (1941); *Screws v. United States*, 325 U.S. 91, 107-111 (1945); *Williams v. United States*, 341 U.S. 97, 99-100 (1951); *Dennis v. Sparks*, 449 U.S. 25, 27-28, (1980).

Moreover, even a private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983. There is no good reason in law, logic, or policy for dismissing claims against police officers, when the evidence shows their involvement was facilitating, in concert, conspiring, and aiding and abetting the commission of crimes, resulting in the loss of life, liberty or property. It seems the potential harm to the public far

outweighs any benefits to law enforcement officials committing a crime.

Indeed, numerous decisions of this Court have repeatedly approved holding state actors responsible for their active "involvement," including well established common law aiding and abetting, concert of action, and conspiracy principles to hold joint actors accountable for resulting harm. This Court has held that *no specific intent to injure a person's constitutional rights was necessary. Parratt v. Taylor*, 421 U.S. 457 (1981).

In distinguishing the criminal counterpart which had earlier been at issue in *Screws v. United States*, 325 U.S. 91 (1945), the *Monroe* Court states:

> "In the Screws case we dealt with a statute that imposed criminal penalties for acts "willfully" done. We construed that word in its setting to mean the doing of an act with "a specific intent to deprive a person of a federal right." 325 U.S., at 103. We do not think that gloss should be put on [§ 1983] which we have here. The word "willfully" does not appear in [§ 1983]. Moreover, [§ 1983] provides a civil remedy, while in the Screws case we dealt with a criminal law challenged on the grounds of vagueness. *[Section 1983] should be read against the background of tort liability that makes a man responsible for the natural consequence of his actions.*" 365 U.S., at 187; *Parratt v. Taylor*, 421 U.S. 457 (1981); *Screws v. United States*, 325 U.S. 91 (1945).

This Court held that if state officer acted under color of his legal authority, he could be sued under § 1983 even if his acts were unlawful under state law. *United States v. Classic*, 313 U.S. 919 (1941) that "[m]isuse of power, possessed by virtue of state law, is action taken 'under color of state law.'" 365 U.S. at 184. In *Bennett v. Pippen*,

74 F.3d 578 (5th Cir. 1996) (holding rape by sheriff of suspect in domestic violence shooting investigation was action taken under color of state law) and *United States v. Tarpley*, 45 F.2d 806 (5th Cir. 1991) (holding that deputy sheriff who claimed to have special authority for his actions acted under color of state law when he assaulted his wife's former lover in his home).

The Fourteenth Amendment to the United States Constitution is violated only by conduct deemed "state action." In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), this Court held that if challenged activities constituted "state action" within the meaning of the Fourteenth Amendment, such conduct also would satisfy the "under color of state law" element of § 1983. The private conduct abridging individual rights does no violence to the Fourteenth Amendment unless to some significant extent the state *in any of its manifestations has been found to have become "involved in it." Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961), relying upon Civil Rights Cases, 109 U.S. 3 (1883). *"The involvement of a state official . . . plainly provides the state action essential to show a direct violation of Fourteenth Amendment rights, whether or not the actions . . . were officially authorized, or lawful." Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 157 n.5 (1978), quoting *Adickes S.H. Kress & Co.*, 398 U.S. 144, 152 (1970) . . . Generally, a public employee "acts under color of state law while acting in his official capacity or while exercising his responsibility pursuant to state law." *West v. Atkins*, 487 U.S. 42 (1988). It is well established Federal Law that a private party is liable as a state actor if he is a *willful* participant in joint activity with the State or its agents. *Lugar v. Edmondson Oil*, 457 U.S. 922 (1982); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970). The Court in *Monroe* reaffirmed the meaning given to the words "under color of" law – *"We conclude that the*

meaning given 'under color of' law in the Classic case and in Screws and Williams cases was the correct one; and we adhere to it." Id. at 187. The conduct of the police officers and the drag race drivers are inextricable and must be viewed together, as the police officers directly killed Jones through the drag race drivers.

The observation of the Third Circuit Court of Appeals in *Black v. Bayer,* 672 F.2d 309, 314-15 (3rd Cir.) *cert. denied,* 459 U.S. 916 (1982), considering the § 1983 liability of private attorneys appointed to represent defendants in criminal cases:

> "To understand the current teachings of the Supreme Court relating to . . . federal § 1983 cases, it is helpful to review briefly the development of relevant precepts. The Court has demonstrated much agility in weaving back and forth among concepts of constitutional deprivation, statutory construction, and state tort liability. Although students of jurisprudence may shudder at the promiscuous mingling of federal constitutional protection notions – derived from the text of a written federal Constitution – with precepts of tort liability – generally the product of evolving state court decisions strongly influenced by the American Law Institute's Restatement of the law – it will serve no useful purpose at this late hour for an inferior court to enter the lists on this formidable issue. The Supreme Court has spoken. The Court has cited no authority for generously mixing tort and constitutional law in interpreting 1983, but it has stated its position vigorously and repeatedly."

Indeed, the requisite level of culpability for a substantive due process violation under the Fourteenth Amendment was found by the District Court in this case –

"[t]*he alleged conduct of the officers that fateful evening is egregious.*" App. 62.[1] The Sixth Circuit discarded the findings of the district court in this case and used an unrecognized standard of culpability to make "a devil[] sick of sin." (*Jones* at 688, citing Wilfred Owen, Dulce Et Decorum Est (1918)) App. 2 – which was not the authorized threshold standard by this Court in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). In *Lewis*, this Court considered the standard of culpability governing a claimed violation of substantive due process arising out of a high speed automobile chase that resulted in the death of plaintiffs' sixteen-year-old son. Reversing the Ninth Circuit's determination that deliberate indifference to or reckless disregard for life was the appropriate standard of fault, and this Court held that only governmental action that shocks the conscience offends the substantive dimension of the Due Process Clause. An Officer doing his job, suddenly pursuing a criminal, does not shock the conscience. This Court then elaborated on the meaning of the "shocks the conscience" standard:

> "It should not be surprising that the constitutional concept of conscience-shocking duplicates no traditional category of common-law fault, but rather points clearly away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability .... We have accordingly rejected the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct, and have held that the Constitution does not *guarantee* due care on

[1] A state actor is liable for breaching his obligation if he engages in conduct which was so ***egregious*** that it can be said to be arbitrary in the constitutional sense. *Ewolski v. City of Brunswick*, 287 F.3d 492, 509 (6th Cir. 2002).

> the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process . . . . It is, on the contrary, behavior at the other end of the culpability spectrum that would most probably support a substantive due process claim; conduct intended to injure in some way unjustifiably by any government interest is the sort of official action most likely to rise to the conscience-shocking level."

This case, of course, is not a high speed chase and the Respondent police officers were not doing their job, pursuing criminals or standing by doing nothing. Thus, the criminal conduct of the police officers in this case, is the kind of conscience-shocking or arbitrary behavior that this Court has in the past condemned. *See, e.g., Daniels v. Williams*, 474 U.S. 327, 331 (1986) (purpose of Due Process Clause was "to secure the individual from the arbitrary exercise of the powers of government" (citations omitted)); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (to sustain state action, the Court need only decide that it is not "arbitrary or capricious"); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389 (1926) (state action invalid where it "passes the bounds of reason and assumes the character of a merely arbitrary fiat," quoting *Purity Extract & Tonic Co. v. Lynch*, 226 U.S. 192, 204 (1912)). In the instant case, the conduct of the Respondent police officers leaps across the constitutional threshold for culpable conduct, since they have done more than recklessly or arbitrarily caused injury to Jones by abusing or misusing government power. Respondents acted criminally, as confirmed by the criminal charges they faced and the State and federal statutes they violated. App. 5. *Lewis does not condone any kind of criminal conduct of government officials.* Of course, the commission of a crime, which is opposite to State statutory duties of a police officer to enforce the

law, is more conscience shocking or egregious than intentional behavior that is not a crime.

Applying the backdrop of common law tort liability to this 42 U.S.C. § 1983 action and a review of the Restatement of Torts Second is appropriate.[2] The language of § 1983 itself contemplates officers acting in concert, conspiring, aiding and abetting private individuals – "Every person who, *under color of* any statute, ordinance, regulation, custom, or usage, of any State or Territory, *subjects, or causes to be subjected*, any citizen . . . the *deprivation of any rights*, privileges, or immunities *secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . , or other proper proceeding for redress.*" This Court and Federal Circuit Courts have incorporated rules of liability regarding concerted activity that are consistent. Finding the Respondents liable under § 1983 is also supported by well established tort principles – Compare Defendant police officers' conduct to well established tort principles of conspiracy, concert of action, and aiding and abetting. Noteworthy, Justice Antonin Scalia, prior to his tenure on the Supreme Court, was on the panel that decided *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), holding a nonparticipant in a burglary that led to a murder civilly liable for the economic consequences under elements of civil conspiracy and aiding and abetting tort principles. *Halberstam* has been cited twice by this Court in recent years, once in a case of aiding and abetting, and the other time in a case of conspiracy. *See Central Bank of Denver*, 511 U.S. 164, 181 (1994) (aiding and abetting); *Beck v. Prupis*, 529 U.S. 494, 503 (2000) (conspiracy). The terms

[2] The Restatements were published by the American Law Institute, which was organized in 1923 with the expressed purpose of "present[ing] an orderly statement of the general common law of the United States . . ." See the Introduction to the Restatement of Torts, at viii.

"aiding and abetting" and "conspiracy" are found both in the common law and criminal law in the United States. These terms are drawn from civil cases, which apply the common law. However, some cases have suggested that there is little distinction between the standard of the common law and the criminal law on these subjects. *See Boim v. Quranic Literacy Institute*, 127 F. Supp. 2d 2002, 1018 (N.D. Ill. 2000) (quoting standard from a criminal case in civil case of aiding and abetting)); *Curtin v. Lataille*, 527 A.2d 1130, 1132 (R.I. 1987) (approving criminal law standard in civil case of aiding and abetting). One distinction that is commonly recognized is the requirement of an "overt act" in civil conspiracy, which is unnecessary in a criminal conspiracy. *See Beck v. Prupis*, 529 U.S. 494, 501-04 (2000). "Aiding" suggests a role in making the act successful, whereas "abetting" connotes setting the actor in motion. *See Baliko v. Stecker*, 645 A.2d 1218, 275 N.J. Super. 182, 191 (1994) ("aid" means to assist, support or supplement the efforts of another," and "abet" means "to encourage, counsel, incite, or instigate the commission of a crime") (internal quotation marks and citation omitted); *cf. Rice v. Paladin Enterprise, Inc.*, 128 F.3d 233, 251 (4th Cir. 1997). The *Restatement (Second) of Torts § 876*, concert of action, in a frequently cited section, states that:

> "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he:
>
> (a) does a tortious act in concert with the other *or* pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance *or* encouragement to the other so to conduct himself . . ."

"It would be just as reasonable to say that a man might start a fire, then by retiring to some distant spot

avoid responsibility for the destruction wrought by the conflagration he initiated." *Calcutt v. Gerig*, 271 F. 220, 223 (6th Cir. 1921). In the instant case, the police officers initiated and facilitated the illegal drag race by their conduct. Moreover, what one judge might consider "concert of action," another might consider "conspiracy," since evidence that persons acted in concert will usually be evidence from which one can imply a common design or plan. *See Calcutt*, 271 F. 220 (6th Cir. 1921). The restatement explains in "Comment on Clause (a), that the term "conspiracy" is often used to refer to a common design or plan for cooperation in a tortious line of conduct or to accomplish a tortious end." Restatement § 876, comment b. Express agreement is not necessary, and all that is required is that there should be a common design or understanding, even though it is a tacit one. Prosser, Law of Torts, Section 46, pp. 291-95 (4th ed. 1971). That duty includes an obligation to prevent fellow officers from committing illegal actions. These officers had a common design with drag race drivers that the illegal drag race should proceed and planned their actions, at least from the point they made contact with Reynolds at midnight, to when they returned and placed an illegal wager on the race, played rap music over the public address system, made contact with Atat at the scene and informed the drag race drivers they were not there to arrest anyone and go ahead with the race.

In the "Comment on Clause (b)," the authors of the Restatement summarize these elements and explain why they create liability: "Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortious it has the same effect upon the liability of the adviser as participation or physical assistance." *Id.* § 876, comment d. For example in *Rael v. Cadena,* 93 N.M. 684, 604 P.2d 822 (1979), involved a

person who had given verbal encouragement ("Kill him!" and "Hit him more!") to an assailant. The Defendant had not physically assisted in the battery. The *Rael* court explained that liability did not require a finding of action in concert, nor even that the injury had directly resulted from the encouragement. Instead, it found, citing Restatement § 876(b), that the fact of encouragement was enough to create joint liability for the battery. Mere presence at the scene, it noted, would not be sufficient for liability.

Restatement Second of Torts § 877, entitled "Directing or Permitting Conduct of Another" is similar:

"For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) orders or induces the conduct, if he knows or should know of circumstances that would make the conduct tortious if it were his own, or (b) conducts an activity with the aid of the other and is negligent in employing him, or (c) permits the other act upon his premises or with his instrumentalities, knowing or having reason to know that the other is acting or will act tortiously, or (d) controls, or has a duty to use care to control, the conduct of the other, who is likely to do harm if not controlled, and fails to exercise care in the control, or (e) has a duty to provide protection for, or to have care used, for the protection of third persons or their property and confides the performance of the duty to the other, who causes or fails to avert the harm by failing to perform the duty."[3]

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[3] Several other sections of the Restatement 2nd of Torts lend support to Petitioner's liability claim. § 302; § 302A – Risk of Negligence or Recklessness of Others; § 302B – Risk of Intentional or Criminal Conduct; § 303 – Acts Intended or Likely so to Affect the Conduct of the Other, a Third Person, or an Animal as to Involve

(Continued on following page)

In this instance, the Respondent police officers actively encouraged the illegal drag race by going into Detroit, at midnight, and telling Reynolds he could "go ahead with the race"; returning approximately one hour before the race began; played rap music over the public address system; Officer Nasser placed an illegal bet on the race; and Officers announced over the public address system "we're not here to arrest anyone, go ahead with the race." Thus, if the defendant police officers had simply stood by at the scene that fateful night, they would not have been exposed to liability. However, their criminal involvement with private actors, in the context of common law tort principles and state actor involvement case law, is the basis for Constitutional liability under 42 U.S.C. § 1983. Thus, application of federal common law tort principles would lead to consistency, uniformity and clarity among the Federal Circuits analyzing 42 U.S.C. § 1983 claims, which involve criminal conduct of police officers.

III. THIS COURT SHOULD RESOLVE THIS LEGAL ISSUE OF FIRST IMPRESSION – WHETHER THE DEFENSE OF ASSUMPTION OF RISK IS A VIABLE DEFENSE TO A CLAIM BROUGHT UNDER 42 U.S.C. § 1983, INVOLVING CRIMINAL PARTICIPATION OF POLICE OFFICERS WITH PRIVATE PERSONS, DIRECTLY CAUSING DEATH.

In addition to the cases cited here, the attached fifty state compendium of assumption of risk cases and statutes, App. 75-82, around the United States have refused to allow the assumption of risk defense in the context of

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Unreasonable Risk; § 323 – Negligent Performance of Undertaking to Render Services; § 321 Duty to Act When Prior Conduct is Found to be Dangerous.

criminal conduct, and even in almost all cases eliminated or limited the defense in the context of mere negligence claims. Absurdly, and contrary to well established law, the Sixth Circuit held that Jones assumed the risk that her constitutionally guaranteed interest in life is a complete defense to the criminal actions of police officers illegally facilitating the drag race drivers. App. 15. There is no Supreme Court or Circuit Court of Appeals decision speaking to the assumption of risk in the context of 42 U.S.C. § 1983 or the Constitution. The Sixth Circuit claims Jones' presence, watching, on the public sidewalk at 1:45 a.m., in Detroit, gave the Lincoln Park police officers and drag race driver's justification to engage in dangerous illegal activity that killed her. Even if this Court finds the assumption of risk is a defense to a 42 U.S.C. § 1983 or constitutional claim – The Respondents did not and cannot prove that Jones assumed the risk of specifically being killed, because at common law the requirements of assumption of risk are that: (1) the plaintiff has knowledge of facts constituting a dangerous condition, (2) he knows the condition is dangerous, (3) he appreciates the nature or extent of the danger, and (4) he voluntarily exposes himself to danger. Moreover, Petitioner's position is the following:

a. Assumption of risk must be pleaded and proven by person asserting this as an affirmative defense;

b. Assumption of risk is not a defense to violation of 42 U.S.C. § 1983; and

c. Assumption of risk is not a defense to criminal conduct.

The Respondents never claimed Jones assumed the risk and the Sixth Circuit never cited or found Jones violated any law or ordinance by virtue of her presence. Assumption of risk defense must be pleaded and proven.

Federal Rule 8(c) provides, in pertinent part: "In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk . . . , and any other matter constituting an avoidance or affirmative defense." Fed. R. Civ. P. 8(c) (emphasis added). Nor is there any evidence Jones knew or appreciated the risk of police officers committing a crime with private persons.

There is nothing contained in § 1983 that permits assumption of risk as an affirmative defense. The public interest intended to be protected by § 1983, has among its purposes that of protecting citizens from illegal, abusive, or arbitrary state action, which would be defeated if assumption of risk were open as a complete defense. No assumption of risk defense available in the context of a seaman's injury brought under the Jones Act. *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 83 L. Ed. 265, 59 S.Ct. 262 (1939). It seems plain, therefore, that the § 1983 is a law, concerned with only protecting the rights of the people. The police officers never argued, anywhere, the assumption of risk, or presented any evidence to establish the defense. There is no law or ordinance which prohibited Jones from being on a public sidewalk at 1:45 in the morning. There is no case law anywhere that allows the assumption of risk in a criminal or intentional tort claim. Michigan is in agreement the burden of proof generally rests upon one who has the affirmative responsibility to establish an issue necessary to his cause of action *or defense*. *Rasch v. East Jordan*, 141 Mich App. 336; 367 NW2d 856 (1986); *Tuttle v. Brown*, 131 Mich App. 256; 346 NW2d 87 (1983), app. den. 419 Mich 938 (1984).

There is not a single case anywhere in the entire United States which has held that assumption of risk is a defense to criminal conduct. It is standard hornbook law that assumption of risk is not a defense to an intentional

tort. *See* W. Prosser & W. Keeton, Torts 462 (5th ed. 1984). It is common law that a person need not anticipate the intentional criminal acts of a third party. Nor does one assume the risk of injury from the criminal acts of third parties. Contrary to the Sixth Circuit's decision in *Jones*, the State of Michigan where Jones was killed has spoken to the issue in *Rozenbloom v. Estate of George Proper*, 177 Mich App. 49; 441 NW2d 11 (1989), the Michigan Court of Appeals held that primary assumption of risk is not a defense to intentional tort, even in the context of police officers and firemen. In doing so the Michigan Court of Appeals agreed with the following remarks from *Berko v. Freda*, 93 NJ 81; 459 A.2d 663, 667-668 (1983):

> "Certainly, the policeman and his employer should have some private recourse for injuries so blatantly and criminally inflicted." *Krueger v. City of Anaheim*, 130 Cal App. 3d 166, 170; 181 Cal Rptr 631, 634 (1982). No fundamental unfairness results from allowing an officer to sue a criminal. The crook does not summon the police for help. While the police are paid to risk being assaulted, they are not paid to submit to a criminal assault."

In the context of police officers and firemen the *Rozenbloom* court held the defendant's intentional actions will likely be found to be criminal acts upon the officer, the defendant should not receive the benefit of the fireman's rule to shield him from civil liability. There is not a single case, in the entire fifty United States which allows assumption of risk as a defense to criminal actors. The Sixth Circuit's ruling is illogical and an absurdity. Indeed, in the 42 U.S.C. § 1983 context, the courts have allowed convicted criminals in the custody of law enforcement to bring substantive due process claims, even though their criminal acts have placed them in the hands of the law enforcement officials that violated their civil rights. Jones' presence on

the sidewalk does not justify the criminal conduct of the police officers that took her life.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Sixth Circuit Court of Appeals, or alternatively remand this case with instructions to the Sixth Circuit Court of Appeals to apply common law tort principles and the "under color of" law analysis cited in *Monroe v. Pape*, 365 U.S. 167 (1961), and its progeny.

Respectfully submitted,

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Dated: October, 2006

Dorothy JONES, as personal representative of the estate of Denise Michelle Jones, deceased, Plaintiff-Appellant,

v.

Aaron REYNOLDS; Mustapha M. Atat; City of Lincoln Park; William Kish, III; Joseph Lavis; Douglas Muncey; Mohamed Nasser, Defendants-Appellees.

No. 04-2320.

United States Court of Appeals,
Sixth Circuit.

Argued: Nov. 2, 2005.

Decided and Filed: Feb. 27, 2006.

ARGUED: Joseph Dedvukaj, Southfield, Michigan, for Appellant. Michelle A. Thomas, Thomas, DeGrood & Witenoff, Southfield, Michigan, Rosalind Rochkind, Garan Lucow Miller, Detroit, Michigan, for Appellees. **ON BRIEF:** Joseph Dedvukaj, Southfield, Michigan, for Appellant. Michelle A. Thomas, Thomas, DeGrood & Witenoff, Southfield, Michigan, Rosalind Rochkind, John J. Gillooly, Garan Lucow Miller, Detroit, Michigan, for Appellees.

Before: MOORE and SUTTON, Circuit Judges; BUNNING, District Judge.*

SUTTON, J., delivered the opinion of the court, in which BUNNING, D.J., joined.

MOORE, J. (pp. 699-707), delivered a separate dissenting opinion.

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* The Honorable David L. Bunning, United States District Judge for the Eastern District of Kentucky, sitting by designation.

OPINION

SUTTON, Circuit Judge.

At 1:45 a.m. on October 8, 2001, Aaron Reynolds and Mustapha Atat began a drag race on a public street on the outskirts of Detroit. After roughly one-sixth of a mile, Reynolds lost control of his car and it veered into a crowd of spectators, striking Denise Jones and killing her. What separates this calamity from many others is that police officers from the City of Lincoln Park, a suburb of Detroit, arrived at the scene before the race and had an opportunity to prevent it from beginning. Not only did they fail to stop the race but, so far as this summary-judgment record shows, they also expressly allowed the participants to proceed with the race. For their part in this incident, the officers faced separate state-law criminal charges, a separate state-law civil lawsuit and eventually this § 1983 action, which claimed that the misconduct of the officers and the City of Lincoln Park violated Jones' substantive due process rights.

When a claimant attempts to hold public officials responsible for private acts of violence under the Fourteenth Amendment, as this § 1983 action does, the depravity of the fact pattern often is enough to make "a devil[] sick of sin." Wilfred Owen, *Dulce Et Decorum Est* (1918). This case is no exception. And when a claimant argues that government officials failed to prevent private individuals from causing another injury, as this § 1983 action does, *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), and its progeny rarely permit the claim to go forward. This case is no exception. Because the officers did not have custody of Denise Jones at the time of the

accident, because the officers' actions did not place Denise Jones in any more danger than she voluntarily undertook before they arrived and because the officers' participation in this tragedy did not specially place Denise Jones at any more risk than the 150-300 people attending the drag race, all relevant precedent requires us to uphold the judgment of the district court summarily rejecting this constitutional claim.

I.

In the early morning hours of October 8, 2001, four Lincoln Park police officers – William Kish III, Joseph Lavis, Douglas Muncey, Mohamed Nasser – came upon a crowd of individuals at the intersection of Fort Street and Outer Drive in the City of Detroit, which borders Lincoln Park. The crowd of individuals, as it turns out, were spectators awaiting the beginning of a drag race.

While the officers claim that they arrived at the scene five to ten minutes before the race, others claim that they arrived up to an hour before the race started. Several individuals saw officer Nasser approach the drag racers, speak briefly with Mustapha Atat, then return to his police car. Aaron Reynolds, the other drag racer, stated that he intended to abandon the race when the police arrived but proceeded with the race when officer Nasser told Atat that they could "go ahead and race." JA 1041. One spectator claimed to have seen officer Nasser place a bet on the race after he talked to Atat. After the officers returned to their two police vehicles in the parking lot on the Lincoln Park side of the street, several bystanders heard one of the officers announce over his car's public address system that "[w]e are not [here] to arrest anyone,

go ahead with the race," JA 1046, and then heard the officer play rap music over the public address system. The officers claim that they made no such announcement and played music for just "two seconds" and, even then, only to alert the crowd that they were watching and intended to break up the gathering. Spectators estimated that the crowd ranged in size from 150-300 people and noted that the intersection of Fort Street and Outer Drive, which is in Detroit, was completely blocked by the race participants and spectators, preventing traffic into and out of Lincoln Park.

At about 1:45 a.m., the two cars raced north on Fort Street, which is in Detroit, away from the officers. Despite having been at the scene before the race began, the officers did not notify the Lincoln Park police dispatcher, as was department procedure, or attempt to break up the crowd aside from playing music over their public-address system, which was not department procedure. The cars proceeded north at 130 or so miles per hour before Reynolds lost control of his car about one-sixth of a mile from the start of the race. He veered into the crowd, and his car struck several spectators, including Denise Jones, who died from injuries suffered from the collision. After the accident, the officers contacted their dispatcher, who contacted Detroit police. Once the Detroit police arrived, the Lincoln Park police left without giving statements. The Lincoln Park Police Department learned that its officers had been at the scene of the accident only through subsequent media coverage.

The accident prompted several criminal and civil actions. Reynolds pleaded guilty to involuntary manslaughter, failure to stop at the scene of an accident resulting in death, two counts of felonious driving, and

drag racing. Atat faced similar charges but fled the country before he could be prosecuted. Officers Nasser, Muncey and Lavis pleaded no contest to criminal charges of neglect of duty. On March 28, 2003, the Michigan circuit court granted a $25 million default judgment to Dorothy Jones, suing on behalf of the decedent, against the drivers. The court granted summary judgment against Jones on her state tort claims against the officers and the City of Lincoln Park, concluding that "the proximate cause" of the death was Reynolds alone. *See Jones v. Reynolds,* No. 250616, slip op. at *6 (Mich.Cir.Ct. Apr. 7, 2005); *see also* Mich. Comp. Laws § 691.1407(2); *Robinson v. City of Detroit,* 462 Mich. 439, 613 N.W.2d 307 (2000).

Pursuing further legal remedies, Dorothy Jones filed this § 1983 action against the officers and the City of Lincoln Park in federal district court. The district court granted summary judgment to the City and the officers on all of Jones' claims. As to the officers, the court held that Jones "offered no evidence that they knew or had reason to know that the decedent specifically was in any more danger than any other citizen in the area that evening." D. Ct. Op. at 19 (emphasis omitted). As to the City of Lincoln Park, the court held that there was "no evidence of an affirmative act by the City" or that the City knew or should have known of the risk. *Id.* at 24. Jones challenges both conclusions on appeal, where we apply a de novo standard of review, *Beecham v. Henderson County,* 422 F.3d 372 (6th Cir.2005), view the evidence in the light most favorable to the non-moving party, *Cox v. Ky. Dep't of Transp.,* 53 F.3d 146 (6th Cir.1995), and will affirm a grant of summary judgment if the record evidence does not establish a genuine issue of material fact, *Beecham,* 422 F.3d at 374.

II.

Section 1983 provides a federal cause of action for civil damages against an individual acting under color of state law who deprives another of "rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. In this case, Jones argues that the officers violated the substantive due process guarantees of the Fourteenth Amendment when they failed to protect Denise Jones from the perils of an illegal drag race organized by private citizens on the streets of the City of Detroit. To overcome the officers' qualified immunity from this individual-liability action, Jones must make two showings: that the officers violated the decedent's constitutional rights and that those rights were "clearly established" at the time of the incident. *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). The Court has told lower courts that they "must" address the "initial inquiry" before reaching the "clearly established" question. *Id.*

A.

"[N]othing in the language of the Due Process Clause itself," the Court has instructed, "requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *DeShaney v. Winnebago County Dep't of Soc. Servs.,* 489 U.S. 189, 195, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). While "[a] State may, through its courts and legislatures, impose such affirmative duties of care and protection upon its agents as it wishes," the Court has reasoned that such duties will not be "thrust upon them by this Court's expansion of the Due Process Clause of the Fourteenth Amendment." *Id.* at 202-03, 109 S.Ct. 998. The Court has recognized one exception to the *DeShaney* rule: When the State has so restrained the

liberty of the individual that it renders him unable to care for himself, the State has a special relationship with the individual and thus an affirmative duty to protect him. *Id.* at 200, 109 S.Ct. 998. "The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *Id.* Accordingly, "it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the deprivation of liberty triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means." *Id.* (internal quotation marks omitted).

Since *DeShaney,* this circuit has recognized a second exception to the prohibition against holding public officials constitutionally responsible for private acts of violence. Relying on the following language from *DeShaney* – "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them," *id.* at 201, 109 S.Ct. 998 – we have held that when the State "cause[s] or greatly increase[s] the risk of harm to its citizens . . . through its own affirmative acts," it has established a "special danger" and a duty to protect its citizens from that risk. *Kallstrom v. City of Columbus,* 136 F.3d 1055, 1066 (6th Cir.1998). To bring a "state created danger" claim, the individual must show: "(1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; (2) a special danger to the plaintiff wherein the state's actions placed

the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and (3) the state knew or should have known that its actions specifically endangered the plaintiff." *Cartwright v. City of Marine City,* 336 F.3d 487, 493 (6th Cir.2003); *see Kallstrom,* 136 F.3d at 1066.

B.

In this case, Jones has not argued that the officers placed Jones in custody or otherwise restrained her liberty in a way that prohibited her from taking care of herself. The custodial or special-relationship theory of liability thus does not apply. *Cf. Stemler v. City of Florence,* 126 F.3d 856, 868 (6th Cir.1997) ("[T]he officers took the affirmative act of restraining [the individual's] freedom to act on her [own] behalf, and consequently imposed upon themselves a duty to ensure that they were not placing her in danger. Their actions were, in the words of *DeShaney,* a restraint on [her] personal liberty, not a failure to act on her behalf.") (internal quotation marks omitted). That leaves the possibility that Jones can establish a "state created danger." In our view, she cannot satisfy this "demanding standard for constitutional liability." *Sargi v. Kent City Bd. of Educ.,* 70 F.3d 907, 913 (6th Cir.1995).

1.

Jones cannot show that the officers engaged in a cognizable "affirmative act" that "created" this "danger." "There is no evidence that [the officers] took any *affirmative* action that exposed decedent to any danger to which she was not already exposed." *Sargi,* 70 F.3d at 913. Nothing in the record indicates that the race would not

have proceeded if the officers had never arrived at the scene. And nothing in the record indicates that the officers made Jones "more vulnerable" to the risk that she had already undertaken by voluntarily choosing to watch the race. *Gazette v. City of Pontiac,* 41 F.3d 1061, 1065 (6th Cir.1994) ("[A] duty to protect can arise in a non-custodial setting if the state does anything to render an individual *more vulnerable* to danger."); *see Ewolski v. City of Brunswick,* 287 F.3d 492, 509 (6th Cir.2002) (holding that officials' "affirmative actions" must "directly increase the vulnerability of citizens to danger or otherwise place citizens in harm's way"); *Kallstrom,* 136 F.3d at 1066 ("[W]hile the state generally does not shoulder an affirmative duty to protect its citizens from private acts of violence, it may not cause or greatly increase the risk of harm to its citizens without due process of law through its own affirmative acts."); *Peach v. Smith County,* 93 Fed.Appx. 688, 691 (6th Cir.2004) (holding that "no evidence exists that the Smith County defendants' actions created the danger at issue" when they failed to seize all weapons during an arrest and the arrestee later shot and killed his girlfriend).

Jones also cannot establish that the officers "increased" her risk of danger when they failed to stop the race. The officers, it is true, came upon an illegal drag race and failed to stop it – or at least discourage it if, as appears to be the case, the race was being held on streets beyond their jurisdiction. But a "failure to act is not an affirmative act under the state-created danger theory," *Cartwright,* 336 F.3d at 493 – as numerous cases demonstrate, *see Schroder v. City of Fort Thomas,* 412 F.3d 724, 728-29 (6th Cir.2005) (failing to respond to parental complaints about the lack of enforcement of a residential

speed limit in a specific neighborhood was not an affirmative act); *Jones v. Union County,* 296 F.3d 417, 431 (6th Cir.2002) (failing to serve an ex parte protection order on an abusive spouse was not an affirmative act); *Sheets v. Mullins,* 287 F.3d 581, 588-89 (6th Cir.2002) (failing to pursue and investigate a domestic-disturbance call was not an affirmative act); *Weeks v. Portage County Executive Offices,* 235 F.3d 275, 279 (6th Cir.2000) (failing to call an ambulance for an obviously injured citizen was not an affirmative act); *Sargi,* 70 F.3d at 912-13 (failing to obtain immediate medical assistance for seizure victim and instead taking her home was not an affirmative act); *Robinson v. Twp. of Redford,* No. 04-1117, 2005 U.S.App. LEXIS 15003, at *15 (6th Cir. July 20, 2005) (failing to search a room after the report of a break-in was not an affirmative act); *Bullard v. Inkster Hous. and Re-Dev. Comm'n,* 126 Fed.Appx. 718, 720 (6th Cir.2005) (failing to provide adequate security measures for apartment door to prevent break-ins was not an affirmative act); *Peach,* 93 Fed.Appx. at 691 (failing to respond to a call informing police that a woman battered by her husband was returning to spend time with him and that he had a gun was not an affirmative act); *cf. Doe v. Claiborne County,* 103 F.3d 495, 510 (6th Cir.1996) (pre-*Kallstrom* case stating that failing to protect a student from sexual harassment and a rape by another student did not violate substantive due process).

Whether the conduct of government officials in some cases should be treated as a failure to act or as action "may be a difficult question in the abstract," *Bukowski,* 326 F.3d at 709, but we have always treated governmental conduct as "fall[ing] on the inaction side of the line," *id.,* when it does not create or increase the risk of peril posed

by the private actor. *See May v. Franklin County Com'rs,* 437 F.3d 579, 585 (6th Cir.2006) (act of dispatching officers to the scene of a domestic dispute did not increase the risk of harm to the victim and thus did not constitute an affirmative act); *id.* ("Thus even when we accept the testimony of plaintiff's expert, which we must do at the summary judgment stage, May has not produced any evidence that the appellees' act of dispatching an officer to the scene increased the risk of harm to Kirk."); *McQueen v. Beecher Cmty. Sch.,* 433 F.3d 460, 467 (6th Cir.2006) (act of leaving students unsupervised in a classroom, after which one student shot another, did not increase the risk of harm to the victim and thus did not constitute an affirmative act); *Jackson v. Schultz,* 429 F.3d 586, 591-92 (6th Cir.2005) (act of placing a patient in the back of an ambulance did not increase the risk of harm to the victim and thus did not constitute an affirmative act); *Gazette,* 41 F.3d at 1065 (act of lying to the victim's family about the extent to which a kidnapping had been investigated did not increase the risk of harm to the victim and thus did not constitute an affirmative act); *Robinson,* 2005 U.S.App. LEXIS 15003, at *14 (act of assuring shopkeeper that intruder had left the scene did not increase the risk to the victim and thus did not constitute an affirmative act). As these cases indicate, when state action or inaction "neither increase[s] decedent's risk of harm nor render[s] her more vulnerable," *Sargi,* 70 F.3d at 913, the plaintiff cannot establish a cognizable "affirmative act."

Nor can Jones escape this conclusion by emphasizing that the drag racers planned to abandon the race once they saw the officers and would not have proceeded with the race had the officers not told them they could do so. "The question is not whether the victim was safer *during*

the state action, but whether [she] was safer *before* the state action than [she] was *after* it." *Cartwright,* 336 F.3d at 493. No evidence indicates that the drag race would not have proceeded had the officers never arrived, and no evidence indicates that the officers' actions, whether characterized as allowing the race to proceed or as encouraging it, increased the risk to spectators at the race in general or to Jones in particular. To the contrary, the lead premise of Jones' claim is that the drivers were prepared to start the race until the officers came and would have abandoned the race had the officers told them to leave. When the officers nonetheless permitted the race to start, however, plaintiff cannot show that they aggravated the risk of harm to Denise Jones beyond the perils she already faced by voluntarily choosing to watch a drag race on city streets at 1:45 in the morning.

In *Bukowski v. City of Akron,* 326 F.3d 702 (6th Cir.2003), we faced a similar affirmative-act problem. Relying on internet communications, a 39 year old male (Hall) manipulated a mentally disabled 19 year old girl into traveling nine hours by bus to his home, where he raped her. When the parents learned that their daughter was missing, they contacted the police who eventually obtained custody of the girl. Soon after being brought into custody, the girl said that she wanted to return to the man's home. Because the police did not believe that they had authority to detain the girl (even though they thought she was "slow," *id.* at 706) and because her parents had not yet arrived at the police station, they returned the girl to the man's house, where the abuse continued, and they did so without speaking to the girl's parents about their decision.

In rejecting the girl's substantive due process claim against the officers and city, *Bukowski* held that she had not established an "affirmative act," reasoning as follows:

> Although in *DeShaney* the state returned Joshua to the ultimate aggressor, the *DeShaney* Court explicitly rejected the idea that such acts met the state-action requirement. The Court in *DeShaney* was not merely assuming that state actors did not contribute to the hazards faced by Joshua, but it was also holding that the act of returning someone to the same dangers that existed status quo ante does not satisfy the state-action requirement.
>
> Examining the quality of governmental involvement here, it is apparent that the government was no more involved in making Bukowski more vulnerable to private violence than it was in *DeShaney* – *in both cases, the government was merely returning a person to a situation with a preexisting danger.* The plaintiffs' argument that the officials encouraged Hall by their act of returning Bukowski is really the same as the argument that the officials encouraged Hall by their refusal to get involved.

326 F.3d at 709 (emphasis added) (internal citation and quotation omitted).

A similar conclusion applies here. "Whether or not the defendants 'acted' may be a difficult question in the abstract, but *DeShaney* [and *Bukowski*] make[ ] clear that the acts of the officials here clearly fall on the inaction side of the line." *Id.* Indeed, *DeShaney* and *Bukowski* would seem to present the harder fact patterns. In both cases, the police temporarily removed vulnerable individuals from danger by taking them into custody. And when they

returned the victims to the same special danger, the courts nonetheless held that no liability ensued because "the government was merely returning a person to a situation with a preexisting danger." *Id.* at 709; *DeShaney,* 489 U.S. at 201, 109 S.Ct. 998 ("That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all.").

Here, by comparison, the police never took Jones into custody and (so far as the record shows) never had any interaction with her at all. In point of fact, neither party has presented any evidence that Denise Jones was even at the scene when the officers arrived. But even if she was there at that time, both parties agree that she stood on the sidewalk, was almost 266 yards from the start of the race, was still farther from the Lincoln Park Palace parking lot (where the two police cars were parked) and was well within the jurisdiction of the City of Detroit. Under these circumstances, the most that one could say is that when the police arrived they had temporary control (or loose "custody") of the drivers and that they could have retained that control and either stopped the race from occurring (assuming of course that they had jurisdiction over this street) or at least urged the drivers not to race. As in *DeShaney* and *Bukowksi*, they chose not to retain that control and "placed [the drivers and spectators] in no worse position than that in which [they] would have been had [the officers] not acted at all." 489 U.S. at 201, 109 S.Ct. 998; *id.* ("While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.").

Even if an officer bet on the drag race, as one spectator alleges, and even if the officers played rap music for 15 minutes rather than 2 minutes, as other spectators allege, that does not change matters. While such conduct certainly would not have discouraged the participants from proceeding with the race, it also cannot be said that it placed the drivers or spectators in greater danger than if the police had never arrived. As deeply regrettable and ultimately tragic as the officers' actions were, no evidence suggests that their conduct altered the risk of harm to Denise Jones. *See McQueen,* 433 F.3d at 466 ("[J]ust as the plaintiffs in *Cartwright* and *Bukowski* would have faced at least the same danger if the police had not acted, Doe would have faced the danger of Smith drawing his gun and firing at her even if [her teacher] had not acted.").

Further breaking the link between the officers' actions and Jones' death is the uncontested fact that the officers played no role in Jones' decision to attend the drag race. Unlike the victims in *DeShaney* and *Bukowski,* who not only each were temporarily in the custody of the State but also faced age and disability restrictions in their ability to care for themselves, the officers never met Jones (much less took custody over her) and no one has offered any evidence as to why she could not have looked after herself in choosing whether to be a spectator at a dangerous event. When a victim bears some responsibility for the risks she has incurred, it is even more difficult to say that the "state" has "created" the "danger" to her by its affirmative acts. *See Summar v. Bennett,* 157 F.3d 1054, 1059 n. 2 (6th Cir.1998) (rejecting claim because decedent's "voluntary decision to become a confidential informant with all the dangers it presented, not to mention his poor decision to fraternize with criminals in the first place, played a

much greater role in his unfortunate demise"); *Robinson,* 2005 U.S.App. LEXIS 15003, at *14-15 ("[T]he causal relationship between the officers' assurances of safety and Robinson's murder is tenuous in light of intervening choices made by the decedent. The officers . . . did not force or instruct the decedent to remain in the building."); *Peach,* 93 Fed.Appx. at 693 ("[I]t was [the decedent] who independently and voluntarily chose to visit, camp with and stay with Carr after the County issued the order of protection . . . . This undisputed fact also serves to break any alleged link between the murder and the actions of the Smith County defendants.").

Attempting to alter this conclusion, Jones points to several other decisions. None is convincing. "[W]ith respect to non-custodial cases," one of them, *Nishiyama v. Dickson County,* 814 F.2d 277 (6th Cir.1987), "[is] no longer an accurate statement of the law after *DeShaney* and *Collins*," *Stemler v. City of Florence,* 126 F.3d 856, 869 (6th Cir.1997), and at any rate involves the risk-creating act of allowing an inmate to drive a police car unsupervised, *Nishiyama,* 814 F.2d at 279. Another, *Davis v. Brady,* 143 F.3d 1021 (6th Cir.1998), was cited for the first time in Jones' reply brief, where new arguments may not be made, *Rush v. Ill. Cent. R.R. Co.,* 399 F.3d 705, 727 n. 19 (6th Cir.2005). Like *Nishiyama,* at any rate, *Davis* involves the risk-enhancing (if not custodial) act of taking an intoxicated individual into custody, then leaving him on the side of a busy highway far from town. 143 F.3d at 1023. The remaining two cases, *Dwares v. City of New York,* 985 F.2d 94 (2d Cir.1993), and *Reed v. Gardner,* 986 F.2d 1122 (7th Cir.1993), also appear for the first time in the reply brief and are from other circuits to boot. Both cases, moreover, involved victims who faced little danger before the police

intervened and greater peril after the police acted. *See Dwares,* 985 F.2d at 100 (holding that an affirmative act had been established when police told "skinheads" that they would not intervene if they beat up demonstrators participating in a fully licensed rally because the police were providing security for the demonstrators); *Reed,* 986 F.2d at 1126 (holding that an affirmative act had been established when police arrested a sober driver, took her into custody and left her visibly drunk husband to operate the car).

The dissent raises several other points that deserve consideration. What would happen if the officers had not merely said they would decline to stop the race but instead had actually participated in the race – for example, by waving a flag to signal the start of the race, by doing the play-by-play for the race or by driving one of the cars in the race? Dissent Op. at 701. We agree that these examples likely would state a constitutional claim but not because they would establish a claim under *DeShaney.* Had the officers organized or participated in this race, the issue would cease to turn on whether they were responsible for harm caused by a private actor and would turn instead on whether they had caused the harm themselves. *See County of Sacramento v. Lewis,* 523 U.S. 833, 849, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (noting that officers will be liable under the Due Process Clause for injuries caused by "grossly negligent" or "reckless" conduct that "shock[s] the conscience").

Under these circumstances, we would have no reason to determine whether the officers had increased the risk of harm to the victim because they would be *the source* of that risk. Here, however, Jones has not alleged that the officers had anything to do with the organization of the

race or that they participated in it. All of which explains why plaintiff has not presented this case as one in which the officers directly harmed Denise Jones but rather as one in which they allowed private actors to harm her. Yet in order to establish a state-created danger under our case law, plaintiff must show that the state actor increased the risk of harm to the victim – namely, by showing that the government did more than "merely returning a person to a situation with a preexisting danger." *Bukowski,* 326 F.3d at 709.

In some circumstances, we agree, an officer's encouragement of private illegal acts may state a constitutional claim, but that is because in some circumstances such encouragement will increase the risk of harm to the victim and because in some circumstances private misconduct will become public misconduct when it occurs at the prompting of public officials. Yet, as shown, plaintiff has not claimed – and cannot tenably claim on this record – that the officers' actions either created or increased the risk of harm to Denise Jones. In marked contrast, if an officer (inexplicably) had encouraged the assailant in *Bukowski* to rape the victim or if an officer (inexplicably) had encouraged the father in *DeShaney* to beat his son, both officers plainly would have increased the risk of danger to the victims. *See* Dissent Op. at 703. The same simply is not true here. By allegedly choosing not to stop the race and by allegedly saying to the drivers that they "could go ahead and race," JA 1042, the officers acted irresponsibly but they did not increase the risk of harm facing Denise Jones and the 150 or so other people that chose voluntarily to attend the race. For like reasons, *Pena v. DePrisco,* 432 F.3d 98 (2d Cir.2005), does not lead to a different conclusion. There, by continually condoning

excessive drinking and driving over the course of an evening, the officers increased the risk that their fellow officer would cause harm.

As *DeShaney* and *Bukowski* both show, the time frame for assessing whether an affirmative act has occurred is not *after* the officers have arrived and temporarily taken control of the situation but *before* the officers have arrived. In both decisions, the officers took custody of the vulnerable victims and removed the risk of harm to them and only later returned them to the same risk they had faced before their arrival. Were it true that the question whether the officers increased the risk of harm to the victim must be answered from a different vantage point – namely, *after* the officers have arrived on the scene and temporarily removed the risk of harm, *see* Dissent Op. at 702-03 – *DeShaney* and *Bukowski* would have come out differently. Both decisions involved fact patterns in which the officers plainly increased the risk of harm to the victims – if, that is, the proper vantage point is after, not before, the officers arrived. Instead, however, both decisions rejected the claims, concluding that "the government was merely returning a person to a situation with a preexisting danger." *Bukowski,* 326 F.3d at 709; *DeShaney,* 489 U.S. at 201, 109 S.Ct. 998 ("That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all."). *See also Cartwright,* 336 F.3d at 493 ("The question is not whether the victim was safer *during* the state action, but whether [she] was safer *before* the state action than [she] was *after* it.").

All things considered, Jones "cannot show" what our cases require – "that defendant officers created or

increased the risk that [Jones] would be struck by a vehicle." *Cartwright,* 336 F.3d at 493. Because Jones has failed to establish a cognizable "affirmative act," we must reject her claim against the officers as a matter of law.

2.

Jones also has failed to show that the district court erred in holding that she did not satisfy the second prong of this claim – the "special danger" requirement. A special danger exists "where the state's actions place the victim specifically at risk, as distinguished from a risk that affects the public at large." *Kallstrom,* 136 F.3d at 1066. In the only cases where we have recognized a "state created danger," the government could have specified whom it was putting at risk, nearly to the point of naming the possible victim or victims. *See Caldwell v. City of Louisville,* 120 Fed.Appx. 566, 573 (6th Cir. 2004) (concluding that where the threat posed by an abusive husband was only to his wife, the state action "place[d] the victim specifically at risk"); *Waller v. Trippett,* 49 Fed.Appx. 45, 50 (6th Cir.2002) (concluding that public employees working in a prison kitchen were a "limited and specifically definable group," satisfying the special-danger requirement); *Duvall v. Ford,* 187 F.3d 635 (6th Cir.1999) (dismissing on grounds of no affirmative act but acknowledging specific endangerment where a prisoner incarcerated for abusing his wife escaped and fired shots into the trailer where she was living, injuring a family member); *Kallstrom,* 136 F.3d at 1067 (releasing the personnel files of undercover officers, including information about their families and homes, to defense attorneys specifically endangered the officers and their families).

When by comparison the victim was not identifiable at the time of the alleged state action/inaction, we have held that a § 1983 suit may not be brought under the "state created danger" theory. *See Schroder v. City of Fort Thomas,* 412 F.3d 724, 729 (6th Cir.2005) (failing to enforce or lower the speed limit on a residential street "did not create a 'special danger' to a discrete class of individuals (of which the Schroders' son was a member), as opposed to a general traffic risk to pedestrians and other automobiles"); *Jones v. City of Carlisle,* 3 F.3d 945, 949-50 (6th Cir.1993) (holding that an epileptic driver was "no more a danger to [the plaintiff] than to any other citizen on the City streets"); *Janan v. Trammell,* 785 F.2d 557, 560 (6th Cir.1986) (holding that the release of an inmate on parole, who eventually murdered a citizen, did not violate the Due Process Clause because "there is [no] showing that the victim, as distinguished from the public at large, faces a special danger"); *see also Bullard,* 126 Fed.Appx. at *720 (holding that a public-housing resident threatened by poor security in her building could "not meet th[e] very high burden of proving that the state knew or should have known that its actions specifically endangered the plaintiff") (internal quotation marks omitted); *Kennerly v. Montgomery County Bd. of Comm'rs,* 257 F.Supp.2d 1037, 1044 (S.D.Ohio 2003) ("[A] plaintiff cannot merely . . . nam[e] a more particular sub-class of the public as the group to which the government owed a duty, such as one's 'neighbors.' Neighbors are still the public. *Kallstrom* is not ambiguous: the government must be aware that its actions will increase the vulnerability of a specific individual to criminal danger.").

Jones cannot satisfy this standard. The officers never interacted with Denise Jones. No evidence has been put

forward suggesting that the officers had any reason to know that they were putting her at risk by their action/inaction that night. And witnesses to this tragedy estimated that the crowd contained at least 150 people at the time of the race. That figure plainly is more than a handful of people specially put at risk by state action or inaction. And, indeed, it is not unlike the number of people put at risk when the police allegedly failed to enforce a speed limit on a residential street. *See Schroder v. City of Fort Thomas,* 412 F.3d 724 (6th Cir.2005). In *Schroder,* we concluded that there was no special danger despite the fact that Mrs. Schroder had been campaigning for a reduced speed limit (or better enforcement of the current speed limit) on a particular stretch of a residential street on which her family lived and despite the fact that the boy killed was in fact Schroder's son because the threatened group (people who lived on the street) was not sufficiently "discrete." *Id.* at 729. Nor does *McQueen v. Beecher Community Schools,* 433 F.3d 460 (6th Cir.2006), alter this conclusion. There, the victim was one of "five children[] left in a room alone with an armed classmate." *Id.* at 468. Unlike the crowd of at least 150 people lining the drag race route, a handful of students were endangered by the teacher's conduct, and their identities were clear to the teacher at the time she acted (or did not act). Likewise unavailing is *Mitchell v. Duval County School Board,* 107 F.3d 837, 839 (11th Cir.1997), which concluded "that the pleadings nevertheless failed to present facts sufficient to give rise to liability under the special danger theory" in part because the danger to the victim was not "distinguishable from that [to] the general public." *Id.* at 839-40. Indeed, we are not aware of any case from our circuit, or any other, in which a "special danger" was found with respect to a group of 150 people allegedly placed

"specially" at risk by state action. Jones' claim thus independently fails on this ground as well.

C.

Even if there were doubt about these conclusions, it is clear at a minimum that Jones has not shown a violation of constitutional rights that were "clearly established" at the time of the officers' action/inaction. No authority from our circuit extant at the time of the incident even begins to suggest that the 150 people at the drag race would satisfy the "special danger" requirement. And no authority from our circuit supports the theory that the officers committed a cognizable affirmative act when they did not create or increase the danger to Denise Jones that she voluntarily undertook before they arrived.

III.

In view of these conclusions, Jones' claim against the City of Lincoln Park also fails as a matter of law. "[T]he determination that the City's officials did not violate the plaintiffs' constitutional rights resolves the claim against the City as well." *Bukowski,* 326 F.3d at 712-13. Accordingly, whether it was the policy of the department not to stop drag races occurring in Detroit (as Jones claims) or whether state law prevented the department's intervention (as the City claims) makes no difference to the outcome of this dispute. That the officers did not violate Denise Jones' constitutional rights eliminates any potential derivative liability of the City.

* * *

As is so often true in "state created danger" cases, there is much to lament about what happened here. The Lincoln Park police officers behaved exceedingly badly. The drivers had no business racing their cars on Detroit city streets. And Denise Jones exercised poor judgment in attending the race.

The most grating feature of this calamity, however, is that the police, a group upon whom we rely for public safety, had only to exercise reasonable judgment, indeed even below-average judgment, to prevent October 8, 2001 from being anything other than a late-night out for Denise Jones. Yes, the Lincoln Park officers did not have jurisdiction over Detroit city streets. Yes, their lack of jurisdiction over Detroit city streets makes one wonder whom the officers could reasonably assure that this illegal drag race would not be prosecuted – as in fact it eventually was. And yes, as the Michigan courts held, the "proximate cause" of this accident was the actions of the drivers, not the officers. *See Jones v. Reynolds,* 2005 WL 782694 at *6 (Mich. Cir. Ct. April 7, 2005). But by expressly allowing the about-to-begin race to proceed, if not encouraging it to proceed, the officers gave law enforcement a bad name.

Faced with these kinds of assertions, it is tempting to say that they satisfy the "state created danger" doctrine. But, to do so, we would have to say that the doctrine covers conduct it does not – that it covers state action that does not create or increase the risk of danger to the victim and that it applies to state action that does not specifically increase the risk of danger to a discrete individual or group of individuals. And even were we to move the doctrine in these directions, that would not advance this claim because the very act of modifying these rules would defeat plaintiff's obligation to show that the officers

violated "clearly established" law. While we decline to extend the doctrine in this case, nothing in our decision prevents future litigants from arguing what the plaintiff has not argued here – that the alleged actions of the officers converted the private misconduct of the drivers into public misconduct and in the process converted this claim into a direct-injury constitutional claim under the *Lewis,* as opposed to *DeShaney,* line of cases.

As *DeShaney* reminds us, moreover, our decision does not prevent the Michigan legislature from creating "a system of liability" that "would place upon the State and its officials the responsibility" for conduct like this. 489 U.S. at 203, 109 S.Ct. 998. But if the Supreme Court refused to "thrust" such liability upon the State under the Due Process Clause in a case in which the public officials returned a helpless child to his abusive father, only to have him beaten repeatedly until "he suffered brain damage so severe that he is expected to spend the rest of his life confined to an institution," *DeShaney,* 489 U.S. at 192-93, 203, 109 S.Ct. 998, and if the fact pattern presented here likewise shows that the "State" did not "create" this "danger," we are not comfortable imposing such liability here.

IV.

For these reasons, we affirm.

MOORE, Circuit Judge, dissenting.

On October 8, 2001, Aaron Reynolds ("Reynolds") lost control of the car he was driving in an illegal drag race. The vehicle careened into a crowd of spectators, striking

and killing Denise Jones ("Jones"). Several Lincoln Park police officers arrived at the scene before the race began and did not stop it, but this is emphatically *not* what this case is about. What really matters is Jones's evidence that the race was about to be called off for fear of police intervention but ultimately went forward after the officers actively encouraged the race to proceed, reassuring the drag racers and the crowd that nobody would be arrested for conducting the race. Because I believe that this evidence, if credited by a jury, establishes both an affirmative act and a special danger under the state-created-danger theory, I would reverse and remand the case to allow the district court to address the issue of state culpability in the first instance. Thus, I respectfully dissent.

I.

I present the following facts drawn from the record in order to give a fuller picture of the crucial events that transpired on October 8, 2001. Naturally, the defendants dispute much of this account, but given the procedural posture, we must view the evidence in the light most favorable to Jones.

There is evidence in the record to suggest that the race would have been cancelled because of the officers' arrival at the scene. According to an eyewitness, "[e]verybody was fittin' to leave because they [saw] the police." Joint Appendix ("J.A.") at 281 (Young Dep. at 22). Indeed, some vehicles drove away soon after the officers' arrival. J.A. at 1219 (Muncey Statement at 6). Moreover, Reynolds, the driver of the car that struck Jones, "was afraid to race when the Lincoln Park Police first drove up" for fear of being arrested, so he "was in the process of

putting [his] car back onto the trailer, to call off the race." J.A. at 1041 (Reynolds Aff. at 2); *see also* J.A. at 281 (Young Dep. at 22) ("[T]hey [were] about to pack up and leave.").

Of course, the race was not called off. At least one officer – apparently Officer Mohamed Nasser ("Officer Nasser") – briefly spoke to Reynolds and the other drag racer, Mustapha Atat ("Atat"). J.A. at 281-82 (Young Dep. at 22-23), 1041 (Reynolds Aff. at 2), 1046 (Ricks Aff. at 2), 1053 (Moore Aff. at 1), 1239 (Request for Warrant/Investigator's Report at 1). Officer Nasser told Reynolds that the officers "want[ed] to see the race." J.A. at 1041 (Reynolds Aff. at 2). On the way back to his vehicle, Officer Nasser was seen placing a wager on the drag race. J.A. at 1053 (Moore Aff. at 1). Officer Nasser returned to his cruiser, "got on his loud speaker[,] and said, 'We're not here to arrest anyone, go ahead.'" J.A. at 282 (Young Dep. at 23); *see also* J.A. at 1041 (Reynolds Aff. at 2) ("[W]e were told by the Lincoln Park Police to go ahead and race."), 1046 (Ricks Aff. at 2), 1049 (W. Turner Aff. at 2), 1054 (Moore Aff. at 2), 1109 (T. Turner Aff. at 3). Officer Douglas Muncey played rap music over a loudspeaker before the race began. J.A. at 284-85 (Young Dep. at 25-26), 662 (Muncey Dep. at 69), 1042 (Reynolds Aff. at 3), 1047 (Ricks Aff. at 3), 1050 (Turner Aff. at 3), 1053 (Moore Aff. at 1), 1109 (T. Turner Aff. at 3), 1234 (Nasser Statement at 22). In response to the music, the crowd "got hyper" and "everybody start[ed] hollering and . . . dancing." J.A. at 287-88 (Young Dep. at 28-29); *see also* J.A. at 1050 (Turner Aff. at 3). According to an eyewitness, "[i]t's like the police initiated the race to go on." J.A. at 288 (Young Dep. at 29). Indeed, Reynolds attested, "I would not

have raced if the police officers had not told me that we could go ahead and race." J.A. at 1042 (Reynolds Aff. at 3).

II.

In *Kallstrom v. City of Columbus,* 136 F.3d 1055 (6th Cir.1998), we recognized the state-created-danger theory of due process liability and laid out three requirements: an affirmative act that creates or increases the risk, a special danger to the victim as distinguished from the public at large, and the requisite degree of state culpability. *Id.* at 1066-67. Jones has offered sufficient evidence to establish a genuine issue of material fact with respect to at least the first two prongs of the *Kallstrom* test. Because the district court did not rule on the third prong,[1] I would reverse and remand the case to permit the court to address the issue in the first instance.

A. Affirmative Acts that Create or Increase the Risk

"Liability under the state-created-danger theory is predicated upon affirmative acts by the state which either create or increase the risk that an individual will be exposed to private acts of violence." *Id.* at 1066. The majority's conclusion that the officers committed no cognizable affirmative acts has two bases. First, the majority claims that the officers simply failed to stop or discourage the race from happening, such that all the state did was fail to act. *See Cartwright v. City of Marine City,* 336 F.3d 487, 493 (6th Cir.2003) ("[F]ailure to act is not an affirmative act under the state-created danger

[1] Nor did the district court rule on the first prong. I address the issue here, however, because it is the basis of the majority's decision.

theory."). Second, the majority opines that the officers did not increase the danger to Jones. According to the majority, even if the officers had not arrived at the scene, the race would have gone ahead as scheduled, placing Jones in the very danger she faced during the situation as it actually transpired.

Both strands of the majority's reasoning depend on partitioning the officers' conduct into two phases – (1) arrival at the scene and (2) everything else – and then considering only the first. I assume for present purposes that under our precedents, the police would not have committed an affirmative act if they had simply arrived at the race and done nothing, as that truly would have been a failure to act that did not create or increase the risk of the drag race. *But those are not the facts of this case, because that is not all the officers did.* Jones has offered evidence showing that the officers actually were quite busy upon their arrival: they reassured the racers, Reynolds and Atat, that the race could proceed; announced over a loudspeaker that they would not arrest anyone, so the race could "go ahead"; and played rap music over a loudspeaker, which had the effect (and perhaps the intent) of stirring up the crowd. The majority inexplicably refuses to acknowledge that Jones's claim is based on all of this conduct rather than the mere fact that the officers did not stop the race.

The majority offers no persuasive reason for ignoring these actions. It tries to wish away the facts by repeatedly invoking the principle that a failure to act does not state a due process violation, but that gets the inquiry exactly backward: the only way to determine whether the officers merely failed to act is by considering *all the facts.* The decisions cited by the majority certainly do not compel its

myopic view of the facts, as none involved state officials arriving at a scene and then actually encouraging private actors to engage in dangerous acts or telling them that the state would look the other way. Furthermore, it is difficult to square turning a blind eye to post-arrival conduct with the principle that the Due Process Clause "is phrased as a limitation on the State's power to act." *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). This principle instructs us to look at the state's actions, not ignore them. It is why encouraging and condoning private actors' dangerous conduct is relevant to the due process inquiry and may form the basis of liability.[2] *E.g., Pena v. DePrisco*, 432 F.3d 98, 111 (2d Cir.2005) ("[W]hen . . . state officials communicate to a private person that he or she will not be arrested, punished, or otherwise interfered with while engaging in misconduct that is likely to endanger the life, liberty or property of others, those officials can be held liable under section 1983 for injury caused by the misconduct . . . . ").

I cannot help but wonder whether there is *any* post-arrival conduct that the majority wouldn't ignore. Could an officer have waved a green flag to signal the start of the race? Could a second officer have served as a play-by-play announcer over the loudspeaker? Could yet another officer have gotten behind the wheel and actually driven in the race against Reynolds? In response to these questions, the

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[2] This rule is not unique to direct state-created-danger claims. It is also, for example, a well-settled part of § 1983 supervisory-liability doctrine. *See, e.g., Estate of Carter v. City of Detroit*, 408 F.3d 305, 314 (6th Cir.2005) ("Supervisor liability attaches when a supervisor encourages or condones a constitutional violation.").

majority concedes (albeit under the wrong rubric[3]) that officers would run afoul of the Due Process Clause by engaging in these three hypothetical acts. This means that the majority detects a constitutionally significant difference between an officer waving a flag to signal the start of a race and an officer announcing over a loudspeaker that the racers may "go ahead." The line between these two acts is too fine for me to see. What rationale justifies treating these two acts differently? Is it the physical distance between the officers and the racers (i.e., although here the officers were just across the street from the race, they would have had to be *even closer* to wave the starting flag)?[4] Is it the prop used by the officer (i.e., the racers might have been encouraged by the officers giving the "go ahead" over a loudspeaker, but waving the flag would have shown that the officers *really meant it*)? These reasons are obviously too flimsy to bear the weight of a constitutional distinction, yet the majority offers none of its own. All we are left with, then, is the fact that the relevant conduct occurred after the officers arrived at the scene. Perhaps the majority would remove its blinders for post-arrival conduct surpassing some higher level of egregiousness, but

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[3] To be clear, I posit in each of these hypothetical questions that Reynolds's car ultimately strikes Jones, so a private actor is the direct cause of the harm. Thus, the majority cannot brush the examples aside by simply claiming that the state-created-danger theory is not implicated at all.

[4] A fixation with physical proximity might explain why the majority repeatedly notes the fact that the race occurred in Detroit while the officers were in Lincoln Park. While this geographical circumstance might be relevant to whether state law permitted the officers to *stop* the race, it has no bearing on whether the Constitution permits them to actively *encourage* the race.

its reasoning certainly suggests no limits to its brand of willful ignorance.

It is clear, then, that the proper point of comparison is not the risk that Jones would have faced if the officers had never arrived at all, but the risk that would have existed had the officers arrived but not reassured the racers, announced that the race could go ahead, and played rap music (i.e., if they had not committed the acts that the majority ignores). After the officers arrived but before they engaged in this additional conduct, people in the crowd were preparing to leave, some vehicles actually did leave, and one of the racers – Reynolds, the driver who struck Jones – was in the process of putting his car on a trailer and calling off the race. This evidence suggests that the race would not have gone forward if the officers had not committed these additional acts upon their arrival at the scene. By reassuring the racers and the people in the crowd that they could "go ahead" because they would not be arrested and by riling up the crowd with rap music played over a loudspeaker, the officers instead actually *encouraged* the race to proceed. The officers' actions, which revived a drag race that was about to be abandoned, thus created or increased the risk of injury to Jones.

The majority attempts to foreclose this analysis by likening the case to *Bukowski v. City of Akron,* 326 F.3d 702 (6th Cir.2003), and *DeShaney.* In those cases, the state took temporary custody of the eventual victim based on suspicions of abusive circumstances; however, a lack of evidence left the state without legal authority to maintain custody, requiring the victims to be returned. *Bukowski,* 326 F.3d at 705-06; *DeShaney,* 489 U.S. at 192, 109 S.Ct. 998. Upon their respective returns, Lisa Bukowski was raped and Joshua DeShaney was beaten into a coma.

Bukowski, 326 F.3d at 706; *DeShaney*, 489 U.S. at 193, 109 S.Ct. 998. In each case, the court held that the state did not create the danger because it "was merely returning a person to a situation with a preexisting danger." *Bukowski*, 326 F.3d at 709 (relying on *DeShaney*, 489 U.S. at 201, 109 S.Ct. 998).

There are critical differences between the instant case and *Bukowski* and *DeShaney*. Rather than merely suspecting a danger, here the police arrived and actually saw the private actors preparing for the drag race, i.e., the very danger that ultimately harmed Jones. And rather than merely returning the victim to the status quo ante due to a lack of evidence of the risk, here the police encouraged the private actors to engage in the dangerous conduct even though they otherwise would have abandoned it. For *Bukowski* to be truly analogous to the case at bar, the officers would have had to know the rapist was about to attack Bukowski and then tell the rapist to go ahead despite his willingness to stop. Similarly, for *DeShaney* to be genuinely analogous, the state social workers would have had to know DeShaney's father was about to beat his son and then encourage him to proceed even as he was about to give up the attack. Surely *Bukowski* and *DeShaney* would have come out the other way in these hypothetical scenarios.

Of course (and as the majority agrees), it is unimaginable that state officials would act in the manner posed in these hypothetical variations on *Bukowski* and *DeShaney*. But that is precisely the point: Jones has presented evidence that the officers in the instant case *did* act unimaginably, by encouraging Atat and Reynolds to

engage in a dangerous and illegal drag race that ultimately killed Jones (and by egging on the crowd to boot).[5] If this evidence were credited by a jury, it would demonstrate that the officers committed affirmative acts that created or increased the risk of harm to Jones.

The conclusion that the officers' encouragement of the drag race constituted an affirmative act increasing the risk to Jones is consistent with other cases holding that where officers enable or embolden a private actor to drive dangerously, they commit an affirmative act for state-created-danger purposes. In *Pena v. DePrisco,* the officers drank excessively with the private actor (an off-duty officer) and rode in the car with him while he drove drunk. 432 F.3d at 110-11. The court held that a reasonable juror could find that the officers "implicitly but affirmatively condoned [the drunk driver's] behavior and indicated to [the drunk driver] that he would not be disciplined for his conduct." *Id.* at 111. In *Reed v. Gardner,* 986 F.2d 1122 (7th Cir.), *cert. denied,* 510 U.S. 947, 114 S.Ct. 389, 126 L.Ed.2d 337 (1993), the court held that "[p]olice officers who remove sober drivers and leave behind drunk passengers with keys may be said to create a danger or at least render others on the road more vulnerable." *Id.* at 1125. In *Nishiyama v. Dickson County,* 814 F.2d 277 (6th Cir.1987) (en banc), a dangerous convicted felon in police custody was permitted to drive a patrol car unsupervised; he then pulled over a vehicle and beat its driver to death. *Id.* at

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[5] One might argue that an impending rape or beating presents a more likely risk of harm than an impending drag race. This is beside the point, however, because the test is whether the affirmative act created or *increased the risk* of harm. Of course, the occurrence of a drag race presents a greater risk of harm than the absence of one.

279. We explained that the officers who authorized the felon to drive the cruiser "facilitate[d] the crime by providing the criminal with the necessary means and the specific opportunity to commit his crime."[6] *Id.* at 281.

There are obvious parallels between these cases and the instant case. Officers knew or should have known of a potential driver who would be unquestionably dangerous if allowed on the road: a drunk driver in *Pena* and *Reed;* a dangerous felon who could masquerade as a cop in *Nishiyama;* and drag racers here. Rather than simply failing to act, the officers actively did something to enable or encourage the dangerous driver to proceed: in *Pena,* they sent implicit signals condoning drunk driving; in *Reed,* they removed the car's driver and left behind the vehicle's keys with a drunk passenger; in *Nishiyama,* they handed over the keys for a patrol car to an unsupervised, dangerous felon; and here, they reassured the drag racers that they could race, announced over a loudspeaker that nobody would be arrested and that the race could "go ahead", and played rap music to energize the crowd.[7]

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[6] Quoting *Stemler v. City of Florence,* 126 F.3d 856 (6th Cir.1997), *cert. denied,* 523 U.S. 1118, 118 S.Ct. 1796, 140 L.Ed.2d 936 (1998), the majority notes that *Nishiyama* is "no longer an accurate statement of the law." Majority Op. at 694 - 95. *Stemler* 's repudiation of *Nishiyama* was only with respect to the requisite level of state culpability. *Stemler,* 126 F.3d at 869 (explaining that gross negligence – the standard endorsed by *Nishiyama* – was no longer sufficient). *Nishiyama* 's analysis of the officers' facilitation of private violence remains good law.

[7] Of course, the principle that officers commit affirmative acts when they encourage private misconduct that leads to violence is not limited to driving cases. *See Dwares v. City of New York,* 985 F.2d 94, 99 (2d Cir.1993) ("[T]he officers conspired with the 'skinheads' to permit the latter to beat up flag burners with relative impunity, assuring the 'skinheads' that unless they got totally out of control they would not be

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The majority's decision rests on its conclusion that there was no affirmative act as a matter of law. Because I believe that Jones offered enough evidence to survive summary judgment with respect to the affirmative-act issue, I proceed to the remaining *Kallstrom* prongs.

B. Special Danger

In addition to an affirmative act, "plaintiffs alleging a constitutional tort under § 1983 [must] show [a] 'special danger.'" *Kallstrom,* 136 F.3d at 1066. A special danger exists "where the state's actions place the victim specifically at risk, as distinguished from a risk that affects the public at large." *Id.* The district court appeared to conclude that Jones failed to meet this prong because she was not "in any more danger than any other citizen in the area that evening."[8] J.A. at 61 (Dist. Ct. Order at 19); *see also*

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impeded or arrested. It requires no stretch to infer that such prior assurances would have increased the likelihood that the 'skinheads' would assault demonstrators. Thus, in the present case, the complaint asserted that the defendant officers indeed had made the demonstrators more vulnerable to assaults."); *Freeman v. Ferguson,* 911 F.2d 52, 54-55 (8th Cir.1990) (remanding to permit amendment of the complaint to allege that the police chief, who was a close friend of the attacker, had prohibited officers from interfering with the attacker, because such an allegation "presents a claim that the violence the decedents were subjected to was not solely the result of private action, but that it was also the result of an affirmative act by a state actor to interfere with the protective services which would have otherwise been available in the community – with such interference increasing the vulnerability of decedents to the actions of [the attacker] and possibly ratifying or condoning such violent actions on his part. Without such affirmative actions on the part of the chief of police, the danger faced by the [victims] would have arguably been less." (citation omitted)).

[8] The district court purported to resolve the summary-judgment motion on the basis of the third *Kallstrom* prong, i.e., state culpability. The substance of the analysis makes clear, however, that the court

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id. at 65 (Dist. Ct. Order at 23) (noting that Jones was not "in more danger on that evening than any other person on the street that night"). Apparently, the court believed that there was no special danger because Jones was in the same danger as the other members of the crowd, even though the crowd as a group was at greater risk than the public at large.

The district court's view of the special-danger requirement is inconsistent with our precedents. When we have rejected the existence of a special danger, the plaintiff faced the same danger as *the general public. E.g., Schroder v. City of Fort Thomas,* 412 F.3d 724, 729 (6th Cir.2005) (holding that traffic laws and enforcement practices posed "a general traffic risk to pedestrians and other automobiles"); *Jones v. City of Carlisle,* 3 F.3d 945, 949-50 (6th Cir.1993) (holding that an epileptic driver was "no more a danger to [the plaintiff] than to any other citizen on the City streets"), *cert. denied,* 510 U.S. 1177, 114 S.Ct. 1218, 127 L.Ed.2d 564 (1994); *Janan v. Trammell,* 785 F.2d 557, 560 (6th Cir.1986) (holding that the plaintiff "was simply a member of the public at large"); *see also Mitchell v. Duval County Sch. Bd.,* 107 F.3d 837, 839 (11th Cir.1997) ("[The plaintiff] must show that the state affirmatively placed him in a position of danger which was distinguishable from that of the general public."), *cited with approval in Kallstrom,* 136 F.3d at 1066.[9]

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blended the second and third prongs and actually focused on the second prong, i.e., special danger.

[9] *Jones v. Union County,* 296 F.3d 417 (6th Cir.2002), which held that there was no special danger where the state did not timely serve an ex parte order of protection on the plaintiff's ex-husband, *id.* at 431, is not to the contrary. As we explained in *McQueen v. Beecher Community Schools,* 433 F.3d 460 (6th Cir.2006), the state's failure left the

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In contrast, when the danger threatened a group including the plaintiff rather than simply the public at large, we have found a special danger to exist. *McQueen v. Beecher Community Schools,* 433 F.3d 460, 468-69 (6th Cir.2006) (finding the existence of a special danger where the victim was a member of a group of children left in a classroom with an armed classmate); *Waller v. Trippett,* 49 Fed.Appx. 45, 50 (6th Cir.2002) (unpublished opinion) (finding that there was a special danger where the victim, who worked with inmates in a prison kitchen, "was a member of a limited and specifically definable group"); *see also Schroder,* 412 F.3d at 729 (rejecting the existence of a special danger where the state's actions "did not create a 'special danger' to *a discrete class of individuals* (of which the [plaintiff] was a member)" (emphasis added)).

A drag race consists of driving at dangerous speeds for a limited time and distance. The confined scope of the race means that it posed a greater danger to the people lining the street at that time than to the public at large, as most of the general population was not in the vicinity at the time of the race. In other words, the officers' actions set an out-of-control car hurtling toward a specific crowd of people at a specific time. Thus, the spectator crowd constituted a "discrete class of individuals," *Schroder,* 412 F.3d at 729, or "a limited and specifically definable group," *Waller,* 49 Fed.Appx. at 50, that was at greater risk of injury than the general public. As a member of the spectator crowd, Jones faced a special danger.

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plaintiff in the same position as the general public, i.e., unprotected against the ex-husband's potential attacks. *Id.* at 468 n. 8.

The discreteness of the drag race distinguishes it from the dangers in decisions like *Jones v. City of Carlisle* and *Schroder v. City of Fort Thomas.* In *City of Carlisle,* we rejected a claim premised on the state's permitting a person known to suffer from uncontrollable epileptic seizures to maintain a driver's license, because the driver "was no more a danger to [the plaintiff] than to any other citizen on the City streets." 3 F.3d at 947, 950. The state's issuance of a license did not let a danger loose at a specific time and place, because the epileptic driver could have suffered a seizure at any time and could have been anywhere when it happened. Thus, he posed no special threat to a "discrete class of individuals" or a "limited and specifically definable group." In *Schroder,* we turned away a suit based on the state's failure to lower or enforce the speed limit of a street where the decedent was struck by a speeding car, because the state "did not create a 'special danger' to a discrete class of individuals (of which the [decedent] was a member), as opposed to a general traffic risk to pedestrians and other automobiles." 412 F.3d at 725, 729. The majority likens the instant case to *Schroder* because the asserted danger was spatially discrete, i.e., limited to a specific street, in both. Yet the state's conduct in *Schroder* (failing to lower or enforce the speed limit) did not unleash a speeding car on that street at a specific time. Thus, once again, no discrete, limited, or specifically definable group was at risk there.

Finally, the majority claims that our cases actually require the government to be able to "specify whom it was putting at risk, nearly to the point of naming the possible victim or victims." Majority Op. at 696. They say no such thing. We have never held that a group – short of the general public – is too large to be the target of a special

danger. The folly of the majority's revisionist rule demonstrates why we have not heretofore adopted it: the majority denies that Jones faced a special danger because she was part of a crowd, yet it would presumably conclude otherwise if Jones had been the only spectator. Am I to believe that the Due Process Clause, which is "a limitation on the State's power to act," *DeShaney,* 489 U.S. at 195, 109 S.Ct. 998, shields the state when it endangers a *larger* subset of its citizens? My copy of the Constitution does not demand such perverse results. Thus, Jones has presented sufficient evidence to survive summary judgment with respect to the second *Kallstrom* prong.

C. State Culpability

The final requirement of the state-created-danger test is that "[t]he state must have known or clearly should have known that its actions specifically endangered an individual." *Kallstrom,* 136 F.3d at 1066. As I have explained above at footnote 8, this third prong was the stated basis for the district court's grant of summary judgment to the defendants, but the substance of the district court's analysis clearly demonstrates that it was actually analyzing the second prong. Because it did not rule on the third prong, I would remand to the district court to address the issue in the first instance.

III.

Whether a state official should intervene in private affairs is often a tough call, as potential land mines line the paths of both action and inaction. Indeed, this difficulty was a supporting rationale in *DeShaney.* The state was sued for leaving Joshua with his father, but "had

[state social workers] moved too soon to take custody of the son away from the father, they would likely have been met with charges of improperly intruding into the parent-child relationship." *DeShaney*, 489 U.S. at 203, 109 S.Ct. 998. We, too, have recognized this tension. "By failing to detain Bukowski, [state officials] face this lawsuit. If they had chosen to detain her, they may have faced another lawsuit based on charges of false imprisonment." *Bukowski*, 326 F.3d at 712. That liability under the Due Process Clause is narrow reflects the urge to shield the state from liability when it faces such difficult choices. Here, however, the officers faced the following quandary when they arrived upon an illegal drag race and saw the racers and crowd preparing to forego the race before it started: (1) do nothing, leaving the race to be abandoned; or (2) reassure the racers that the race could proceed; announce over a loudspeaker that they would not arrest anyone, so the race could "go ahead"; and play rap music over a loudspeaker to rile up the crowd. The officers picked option two. Before the majority's decision today, I would have thought it uncontroversial that this is not the type of state decisionmaking that *DeShaney* sought to protect. Due process means nothing if the officers' conduct here is all the process that Denise Jones was due.

Because I believe that Jones's evidence would satisfy the first two prongs of the state-created-danger test if credited by a jury, I would reverse the order granting summary judgment to the defendants and remand to the district court to address the third prong (and, if necessary, the issues of qualified immunity and municipal liability) in the first instance.

For the reasons set forth above, I respectfully dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DOROTHY JONES, as Personal Representative of the Estate of DENISE MICHELLE JONES, Deceased,

Plaintiff(s),

v.

AARON REYNOLDS, et al.,

Defendant(s).

CASE NUMBER: 03-71770

HONORABLE VICTORIA A. ROBERTS

CONSOLIDATED WITH:

DOROTHY JONES, as Personal representative of the Estate of DENISE MICHELLE JONES, Deceased,

Plaintiff(s),

v.

CITY OF LINCOLN PARK, ET AL,

Defendants /

Case No.: 03-72418
HONORABLE VICTORIA A. ROBERTS

ORDER

(Filed Sept. 17, 2004)

I. INTRODUCTION

This matter is before the Court on five motions: 1) Plaintiff's Motion for Summary Judgment; 2) Defendants

Kish, Lavis, Muncey, and Nasser's Motion for Summary Judgment; 3) Motion for Summary Judgment on Behalf of Defendant City of Lincoln Park; 4) Motion on Behalf of Defendant City of Lincoln Park to Supplement and/or Strike the Affidavit of Linda Vertin and for Sanctions Pursuant to F.R.C.P, 56(e)(g); and, 5) Plaintiff's Motion to Strike the Out-Of-Time Supplemental Affidavit Dated June 29, 2004, of Linda Vertin.[1] Oral argument on the dispositive motions was heard on September 1 8, 2004[2]

The Court GRANTS Defendant City of Lincoln Park and the Defendant Officers' Motions for Summary Judgment, DENIES Plaintiff's Motion for Summary Judgment, and deems MOOT the parties' respective motions to strike the affidavit of Linda Vertin.

II. BACKGROUND

This case arises from the death of Denise Michelle Jones on October 8, 2001.[3] Ms. Jones was among a crowd of individuals watching an illegal drag race. She was struck and killed by an errant car that was participating in the race. The race took place on a street in the City of Detroit, Michigan which borders the City of Lincoln Park. At approximately 1:50 a.m., Defendant Aaron Reynolds,

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[1] Plaintiff's cross motion to strike is combined with her response to Defendant Lincoln Park's motion to strike.

[2] Default was entered by the Clerk of the Court on October 9, 2003 against Defendants Aaron Reynolds and Mustapha M. Atat. They did not participate in these motions.

[3] This case is brought by Dorothy Jones, the appointed personal representative of the decedent's estate. Dorothy Jones will, hereinafter, be referred to as "the Plaintiff."

the driver of one of the cars participating in the race, lost control of his car and struck the decedent and others. Ms. Jones was struck with such force her leg was severed and she died.[4] At the time of the accident, there were over 100 people gathered. Per Plaintiff, the racing cars attained speeds over 130 miles per hour.

The events leading up to the fatal accident are disputed. Defendants William Kish, III, Joseph Lavis, Douglas Muncey, and Mohamed Nasser, Lincoln Park police officers, were in uniform and working the midnight shift on October 8, 2001. Lavish and Kish rode together in a semi-marked patrol car. Muncey and Nasser were in a marked patrol car.

The testimony of witnesses suggests that a crowd gathered at the intersection of Fort Street and Outer Drive and preparations were underway for a drag race as early as 1:15 a.m.. Trailers containing the race cars were parked at the intersection.

The Defendant officers admit to parking their patrol cars across the street from the race in the parking lot of the Lincoln Park Palace party store, which is on the Lincoln Park side. However, they deny knowing that a race was about to take place, and assert that they stayed out of concern that people would cross over and create a disturbance in Lincoln Park. Officers Muncey and Nasser, however, gave conflicting statements during an early Internal Investigation; then, they both admitted that they spoke with an unidentified man at the corner of Fort and

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[4] Two other individuals were also injured during the accident.

Outer Drive at approximately midnight, who told them that a race was planned for later.

With respect to how both patrol cars came to be at that location prior to the race, Lavis and Kish indicate that they detained a female pedestrian on Fort, approximately one-quarter mile south of Outer Drive sometime before 1:00 a.m. During the stop, Nasser and Muncey drove by as part of their routine patrol, and briefly stopped to offer back-up assistance. Nasser and Muncey then drove to the party store parking lot. And, at Lavis' direction, Kish drove Into the same parking lot minutes later.

There is significant dispute as to how long the officers were in the parking lot prior to the race, and the extent of the contact they had with the crowd and race participants. Muncey states that he and his partner arrived approximately five to ten minutes before the race started, and that Lavish [sic] and Kish arrived one to two minutes after they did. Kish states that they were only present two to three minutes prior to the race,

However, witnesses place the officers in the parking lot much earlier. Willard Turner, who lived in the area and watched from the rear of his house, states in an affidavit that he saw the officers parked at the store as early as 1:15 a.m., approximately thirty-five minutes before the race. Mr. Turner's (then) wife, Tara Turner, says that she was drawn outside by loud noise at 1:20 a.m. and that she did not call the police because Lincoln Park officers were already there. Another spectator, Byron Eugene Moore, states that he was at the intersection at approximately 1:30 a.m. and observed a squad car across the street. Another witness, Eric Canack, testified during the criminal proceedings that he captured the officers (in their

squad cars) on videotape approximately one hour before the race began.

The officers assert that their only involvement in the race was when Defendant Muncey played rap music over his public address system. Muncey testified that the purpose of doing so was to get the crowd's attention, and perhaps encourage them to disburse.[5] One witness testified, however, that the music actually made the crowd hyper, such that people started hollering and dancing, Several other witnesses also indicate that the officers were much more involved than they claim.

For instance, Reynolds states in an affidavit that Defendants Nasser and Muncey pulled up to the trailers, and Nasser told Reynolds that the officers wanted to see the race.[6] Reynolds' statement is corroborated by three witnesses who state that they observed an officer exit his squad car, cross the street, and talk with one or both of the race car drivers. One witness further asserts that he also saw the officer place a wager on the race on his way back to his squad car.

Prior to being approached by the officer, Reynolds says that he was in the process of putting his car back onto the trailer. He was going to call the race off because he feared that he would be arrested. Reynolds says that he only continued with the race because he received permission

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[5] Lincoln Park Police Chief Alan Kish testified that using the public address system in such a manner was not provided for in the rules and regulation and would generally be considered inappropriate.

[6] Reynolds actually only identified the officer that he spoke with as being of Arabic descent. There is no apparent dispute that Defendant Nasser is the person to whom he is referring.

from the officers to do so. Five witnesses state that they heard one of the officers say over the public address system that they were not there to arrest anyone, and for the racing participants to "go ahead with the race." Thereafter, witnesses estimate that music was played over the squad car public address system for anywhere from five to fifteen minutes. Muncey denies making any statements over the public address system and claims that he only played music for two seconds.

Officers Lavis, Muncey, and Nasser claim that one reason that they did not intervene and attempt to disburse the crowd was because the activity was contained completely on the Detroit side of the street. They claim that the crowd was not impeding traffic at all in Lincoln Park. However, in their later guilty plea to misdemeanor charges stemming from this incident, they stipulated as part of their plea that "they failed to take any action, which would open the street, that being Fort Street, which runs through Lincoln Park and the City of Detroit, and failed to take any action to open that street up and allowed it to be obstructed by the drag racing." Witnesses also state that people and cars blocked the traveled portion of Fort in both Detroit and Lincoln Park.[7] Reynolds and witness Eric Draw's diagrams

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[7] Tierome Young also testified that Fort street was blocked. But, he only verbally agreed that the street was blocked on the northwest side of Fort, which would be in Detroit. Pl. Exh. 5, pp. 23-24. However, he apparently indicated on a diagram another area that was blocked. He does not sufficiently describe the area in his testimony, though, for the Court to ascertain what he is referring to, and the diagram was not attached. Therefore, it is not clear whether, as Plaintiff asserts, Young was testifying to blockage on the Lincoln Park side of Fort as well. Witness Willard Turner also states that traffic was blocked on the northbound side of Fort, but he does not indicate whether it was the Detroit or Lincoln Park side of Fort, or both. Pl. Exh. 8.

indicate that people and cars blocked the flow of traffic on Fort, southeast of Outer Drive, which is Lincoln Park, and northeast of Outer Drive, which is Detroit. The cars actually raced in Detroit traveling down the east side of Fort, heading north, with a starting point north of Outer Drive.

After the crash, at approximately 1:50 a.m., Defendant Lavis notified Lincoln Park dispatch that they were going into Detroit to investigate the accident, and he requested that the Detroit Police Department (DPD) be contacted.[8] Lavis also summoned a rescue squad. Shortly thereafter, Detroit Police and Fire Departments arrived and took control of the scene. According to Defendant Lavis, the DPD did not request, and in fact rebuffed, his attempts to provide information or other assistance at the scene. Officer Nasser admits that he did not offer the DPD his name as a witness and that he was never contacted by anyone from the DPD.

Prior to the crash, none of the officers notified their superiors or the DPD of the activity they observed. Defendants acknowledge that this was a violation of Lincoln Park policies and procedures. Had the officers reported the activities to their shift commander, Lieutenant Robert Duncan, Duncan claims that he would have employed the usual practice of alerting the DPD or the Michigan State Police (which had overlapping jurisdiction). Also, per Duncan, if the DPD had requested assistance, the Lincoln Park Police Department would have required its officers to help out if officers were available to do so.

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[8] Per Defendants, the officers could not have contacted the Detroit Police Department (DPD) directly from their police radios. They would have had to notify central dispatch and requested that DPD or the Michigan State Police be contacted.

After the crash, none of the officers filed or made any report regarding the incident and their observations. Chief Kish first learned of the race and that the officers were present when advised by an investigative reporter. Chief Kish then instituted an internal investigation, which resulted in discipline of Lavis and Kish for not reporting their location when they first stopped at the party store, and of Muncey and Nasser for "conduct unbecoming of an officer" and failure to report their location to dispatch. The officers were also charged by the Wayne County Prosecutor with drag racing, willful neglect of duty, and willful failure to uphold the law. Nasser, Muncey, and Lavis pled no contest to willful neglect of duty. The remaining charges were dismissed. All charges were dismissed against Defendant Kish. All officers are still employed by the Lincoln Park Police Department (LPPD).

Reynolds pled guilty to involuntary manslaughter, failure to stop at the scene of an accident resulting in death or injury,[9] two counts of felonious driving, and one count of drag racing. Per Plaintiff, the other driver, Mustapha Atat, who is also named in this action, is a fugitive and has fled to his native country.

Drag racing is a misdemeanor traffic violation.[10] However, all of the Defendants contend that the officers

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[9] He apparently fled the scene after the accident.

[10] M.C.L. § 257.626a states:

> It shall be unlawful for any person to operate any vehicle upon any highway, or any other place open to the general public, including any area designated for the parking of motor vehicles, within this state, in a speed or acceleration contest or for the purpose of making a speed record, whether from a standing start or otherwise over a measured or unmeasured distance, or in a drag race as herein defined.

were not at liberty to take any action to disburse the crowd in Detroit or actively prevent criminal activity occurring in Detroit, because Detroit is outside their jurisdiction. In fact, Defendants assert that the officers were *required* by LPPD policies and procedures to remain within Lincoln Park city limits. Had the drag racing occurred in Lincoln Park, however, the City of Lincoln Park asserts that the officers were trained to respond to such activity.

Plaintiff disputes Defendants' interpretation of state law; she says that the officers had jurisdiction over criminal activity occurring on a city border.[11] Plaintiff further contends that the City of Lincoln Park is also liable for having a "hands off" policy of failing to take action against drag racing that allegedly occurred frequently for over eight years on the city border. Defendants maintain. however, that Lincoln Park city officials had no knowledge,

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"Drag racing" means the operation of 2 or more vehicles from a point side by side at accelerating speeds in a competitive attempt to out-distance each other over a common selected course or where timing is involved or where timing devices are used in competitive accelerations of speeds by participating vehicles. Persons rendering assistance in any manner to such competitive use of vehicles shall be equally charged as participants. The operation of 2 or more vehicles either at speeds in excess of prima facie lawfully established speeds or rapidly accelerating from a common starting point to a speed in excess of such prima facie lawful speed is prima facie evidence of drag racing and is unlawful.

[11] *See* M.C.L. §257.726a, which states:

A peace officer of any county, city, village or township of this state may exercise authority and powers outside his own county, city, village or township when he is enforcing this act on a street or highway which is on the boundary of the county, city, village or township the same as if he were in his own county, city, village or township.

prior to October 8, 2001, of: 1) prior instances where Lincoln Park patrol officers failed to report drag racing in Detroit; 2) citizen complaints regarding failure by Lincoln Park patrol officers to report drag racing in Detroit; or 3) citizen complaints or other reports of Lincoln Park officers actively encouraging or participating in drag racing in Detroit. Nasser testified, however, that he was aware of numerous complaints prior to October 8, 2001 about drag racing, although he did not know whether the complaints were from Lincoln Park citizens. Muncey admitted that he witnessed races on prior occasions and did nothing about them. Another officer who was not involved in this incident, Robert Steele, also acknowledged that races took place in that location frequently. Witness Tara Turner stated that she saw Lincoln Park Police cars at races on several prior occasions, although she stated that this was the first time officers appeared to be participating.

Plaintiff pleads one count of conspiracy against the officers and drag racing drivers, and two counts alleging violation of 42 U.S.C. §1983 against the officers and the City of Lincoln Park. Earlier, Plaintiff filed a complaint in Wayne County Circuit Court based upon the same incident. Summary disposition resulted in dismissal of her state law claims. A final judgment in favor of Defendant was entered on August 8, 2003. An appeal is pending before the Michigan Court of Appeals.

On multiple grounds, Plaintiff, Defendant officers, and Defendant City of Lincoln Park ask for summary judgment in their respective favors.

III. STANDARD OF REVIEW

Under Fed. R. Cir. P 56(c), summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Copeland v. Machulis,* 57 F.3d 476, 478 (6th Cir. 1995). A fact is "material" and precludes a grant of summary judgment if "proof of that fact would have [the] effect of establishing or refuting one of the essential elements of the cause of action or defense asserted by the parties, and would necessarily affect application of appropriate principle[s] of law to the rights and obligations of the parties." *Kendall v. Hoover Co.,* 751 F.2d 171, 174 (6th Cir. 1984). The court must view the evidence in the light most favorable to the nonmoving party and it must also draw all reasonable inferences in the nonmoving party's favor. *Cox v. Kentucky Dept. of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995).

The moving party bears the initial burden of showing that there is no genuine issue of material fact. *Snyder v. AG Trucking Co.*, 57 F.3d 484, 488 (6th Cir. 1995). To meet this burden, the moveant may rely on any of the evidentiary sources listed in Rule 56(c). Cox, 53 F.3d at 149. Alternatively, the movant may meet this burden by pointing out to the court that the nonmoving party, having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case, and on which that party will bear the burden of proof at trial. *Tolton v. American Biodyne, Inc.,* 48 F.3d 937 (6th Cir. 1995); *Street v. J.C. Bradford* & Co., 886 F.2d 1472 (6th Cir. 1989). The moving party does not, however, have to support its motion for summary judgment with evidence

negating its opponent's claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985).

Once the moving party has met its burden, the burden shifts to the nonmoving party to produce evidence of a genuine issue of material fact. Rule 56(e); *Cox*, 53 F.3d at 150. The nonmoving party cannot rest on its pleadings, but must present significant probative evidence in support of its complaint. *Copeland*, 57 F.3d at 479. "The mere existence of a scintilla of evidence to support the nonmoving party position will be insufficient; there must be evidence on which a jury could reasonably find for the nonmoving party." *Id; See also Snyder*, 57 F.3d at 488; *Tolton*, 48 F.3d at 941.

IV. ANALYSIS

For the reasons stated below, the Court finds that Plaintiff has failed as a matter of law to present evidence in support of either a claim of conspiracy under 42 U.S.C. §1985, or a violation of 42 U.S.C. §1983. Because there is significant overlap among the parties' respective motions for summary judgment, the Court will address the issues raised with respect to each count, rather than by the separate motions.

A. 42 U.S.C. §§1985

Plaintiff brings her conspiracy claim under 42 U.S.C. §1985(3), which provides a cause of action for conspiracy to deprive a person of equal protection of the laws:

> If two or more persons . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal

> protection of the laws, or of equal privileges and immunities under the laws . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

In order to state a cause of action under §1985(3), the plaintiff must allege that the defendants 1) conspired together, (2) for the purpose of depriving, directly or indirectly, a person or class of persons of the equal protection of the laws, and (3) committed an act in furtherance of the conspiracy, (4) which caused injury to person or property, or a deprivation of any right or privilege of a citizen of the United States, and (5) that the conspiracy was motivated by racial, or other class-based, invidiously discriminatory animus." *Bass v. Robinson,* 167 F.3d 1041, 1050 (6th Cir 1999) (citing *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971)). *See also Vakilian v Shaw,* 335 F.3d 509, 518-519 (6th Cir. 2003).

Despite the well-settled requirement that there be some evidence of class-based discrimination, Plaintiff maintains that she states a viable cause of action, citing selectively from *Hampton v Hanrahan,* 600 F.2d 600 (7th Cir. 1979), *rev'd in part on other grounds,* 446 U.S. 754 (1980), and *Hoffman-LaRoche, Inc. v Greenberg,* 447 F.2d 872 (7th Cir. 1971). Plaintiff cites the *Hampton* Court's definition of a conspiracy under 42 U.S.C. §1985 with

regard to the requirement that the parties to the conspiracy agree upon an act to cause harm to another. However, in accord with the Sixth Circuit, the *Hampton* Court also stated that: "Proof of class-based animus underlying the conspiracy is, of course a requirement of a section 1985(3) claim. . . . The statute was intended, perhaps more than anything else, to provide redress for victims of conspiracies impelled by a commingling of racial and political motives." 600 F.2d at 623.

Plaintiff cites *Hoffman-LaRoche* for the proposition that circumstantial evidence is sufficient to state a claim. However, the claim of conspiracy at issue in *Hoffman-LaRoche* was based on Illinois common law with regard to general conspiracies, not the §1985 civil rights statute. Therefore, *Hoffman-LaRoche* plainly does not apply here.

As Defendants assert, Plaintiff has not alleged any facts that would support a finding that their alleged acts and omissions were motivated in whole or in part by class-based discrimination. Therefore, Plaintiff's §1985(3) claim fails as a matter of law. Consequently, her §1986 claim necessarily fails:

> Section 1986 creates a cause of action for knowing failure to prevent wrongful acts pursuant to a conspiracy to interfere with civil rights, as described in 42 U.S.C. §1985. Where a plaintiff has stated no cause of action under §1985, no cause of action exists under §1986.

Braley v City of Pontiac, 906 F.2d 220, 227 (6th Cir. 1990).

Defendants' motion for summary judgment with respect to Plaintiff's claim of conspiracy is granted.

B. 42 U.S.C. §1983

Plaintiff alleges that the Defendant officers and the City of Lincoln Park, in violation of 42 U.S.C. §1983, deprived the decedent of her constitutional right to substantive due process under the Fourteenth Amendment. 42 U.S.C. §1983 states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen . . . the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

A claim brought under §1983 "requires a showing that the plaintiff possessed a right; that he or she was deprived of that right; and that the deprivation was caused by the reckless or intentional conduct of a person acting under color of law." *Ahlers v Schebil,* 994 F. Supp. 856, 864 (E.D. Mich. 1998). Injuries caused by mere negligence do not constitute a "deprivation" of a constitutionally protected right. *Id* (quoting *Lewellen v The Metropolitan Government of Nashville,* 34 F.3d 345, 348-349 (6th Cir. 1994)), *cert den,* 513 U.S. 1112 (1995)).

The City of Lincoln Park disputes Plaintiff's interpretation of its obligations under state law. It further contends that there is no evidence of failure to train or that it had prior knowledge of the pending danger or that officers previously engaged in the actions alleged against the officers. On these grounds, the City moves for summary judgment. The Defendant officers dispute many of the factual allegations upon which Plaintiff bases her claim that she is entitled to summary judgment as a matter of

law. They also move for summary judgment, asserting that Plaintiff failed to establish either a constitutional violation, or that the right allegedly infringed was clearly established. If the Court does find a constitutional violation, the officers contend that they are entitled to qualified immunity.

Even viewing the evidence in the light most favorable to Plaintiff, as the Court is required to do, the Court finds that Plaintiff has not proven a constitutional violation, and her claim against the officers fails as a matter of law. Plaintiff's claim against the City fails as well.

To survive summary judgment based on qualified immunity, the plaintiff must 1) identify a clearly established constitutional right which has been violated; and 2) establish that a reasonable officer in the defendant's position should have known that his conduct violated that right. *Gerdenhire v Schubert,* 205 F.3d 303, 311 (6th Cir 2000). In *Saucier v Katz,* 533 U.S. 194, 200-202 (2001), the Supreme Court explained the appropriate timing and sequence of the immunity inquiry, and distinguished the specific qualified immunity question from the more general issue of whether the facts alleged, taken in the light most favorable to the plaintiff, might support the finding of a constitutional deprivation:

> In a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in proper sequence.
>
> * * *
>
> A court required to rule upon the qualified immunity issue must consider, then, this threshold

question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry. *Siegert v Gilley*, 500 U.S. 226, 232; 111 S.Ct. 1789; 114 L.Ed.2d 277 (1991).

* * *

If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition; and it too serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable.

* * *

[W]e emphasized in *Anderson* [*v Creighton*, 483 U.S. 635 (1987).] "that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense:

The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." 483 U.S. at 640. The relevant, dispositive inquiry in determining whether a right is dearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. See *Wilson v Layne*, 526 U.S. 603, 615; 119 S.Ct. 1692; 143 L.Ed.2d 818

> (1999). ("[A]s we explained in *Anderson* the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established").

The Fourteenth Amendment states that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. Plaintiff contends that the officers violated her rights under the Fourteenth Amendment by failing to enforce a state law precluding drag racing, and by actually encouraging and participating in the illegal activity. Although Plaintiff was actually injured by one of the drivers participating in the race, Plaintiff contends that the officers' alleged endorsement of and participation in the race transformed the drivers from mere private citizens to state actors. Thus, before holding the Defendants liable for constitutional violations, the Court must address whether the actions of these private actors can be attributed to these Defendants.

STATE-CREATED DANGER

It appears that the only possible theory under the Fourteenth Amendment on which Plaintiff could prevail is if she sufficiently establishes the elements of a "state-created danger" theory of liability. This potential theory of liability appears to have been seized upon by several circuits, including the Sixth, based on dicta in *DeShaney v Winnebago County Department of Social Services*, 489 U.S. 189, 197 (1989).

In *DeShaney*, the Court held that generally, the failure of a state actor to protect an individual from

private violence does not constitute a violation of the Due Process Clause:

> [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive Individuals of life. liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.

489 U.S. at 195. *DeShaney* set forth a "special relationship" exception to the above principle, also referred to as the "custodial exception," which provides that the state may be held liable for harm caused by a third party when an actual custodial relationship exists between a plaintiff and a state actor. 489 U.S. at 199-200. Custody is defined as the " 'intentional application of physical force and show of authority made with the intent of acquiring physical control.' " *Cartwright v Marine City*, 336 F.3d 487, 492 (6th Cir. 2003) (quoting *Ewolski v City of Brunswick*, 287 F.3d 492, 506 (6th Cir. 2002)). The rationale for this exception, which was adopted by the Sixth Circuit, was explained in *DeShaney*:

> The state has a duty to protect a citizen 'when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs.'

Id (quoting *DeShaney*, 489 U.S. at 200).

In dicta, the Court alluded to another exception – "state-created danger:"

> While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him more vulnerable to them.

DeShaney, U.S. at 201. Several circuits, including the Sixth Circuit, have relied upon this language in shaping the contours of a "state-created danger" theory of liability.[12] In this Circuit, the exception applies when a plaintiff shows: 1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to private acts of violence by a third party; 2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and 3) the state knew or should have known that its actions specifically endangered the plaintiff," *Cartwright*, 336 F.3d at 493. Thus, in the Sixth Circuit, acts that amount to "state-created danger" can be deemed unconstitutional. In 1998, this Circuit held in *Kallstrom* that "[a]lthough our circuit has never held the state or a state actor liable under the Fourteenth Amendment for private acts of violence, we nevertheless have recognized the possibility of doing so under the state-created-danger theory." 136 F.3d at 1066 (citing *Sargi v Kent City Bd. of Educ.*, 70 F.3d 907, 912-913 (6th Cir. 1995) and *Jones, supra.*).

Therefore, the question is whether Plaintiff has satisfied the elements of "state-created danger" and

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[12] Note that the federal circuits vary significantly with regard to the extent that this exception is recognized and applied.

brought forth sufficient facts to establish that these Defendants engaged in unconstitutional conduct. If no constitutional violation is established, no further inquiry is necessary concerning qualified immunity.

More than a mere failure to act is required to establish an affirmative act in satisfaction of the first element of the "state-created danger" exception. *Cartwright*, 336 F3d at 493. And, the third element is only satisfied when "[t]he state must have known or clearly should have known that its actions specifically endangered an individual," rather than the general public. *Kallstrom v City at Columbus*, 136 F.3d 1055, 1066-1067 (6th Cir. 1998). *See also Jones v City of Carlisle, Kentucky*, 3 F.3d 945, 950 (6th Cir. 1993), *cert. den.*, 510 U.S. 1177 (1994).

In this case, it is not necessary for the Court to decide whether the officers' alleged conduct amounts to affirmative acts (the first element), because it is clear that Defendants have sufficiently refuted the essential third element of the "state-created danger" exception: there is no evidence that the officers knew or should have known that their actions specifically endangered the decedent. *See Kallstrom*, 136 F.3d at 1066-1067.

The alleged conduct of the officers that fateful evening is egregious. However, Plaintiff offered no evidence that they knew or had reason to know that the *decedent specifically* was in any more danger than any other citizen in the area that evening. The Sixth Circuit has been consistent and explicit that such a showing must be made before state-created danger liability can attach.

In *Jones v City of Carlisle, Kentucky, supra*, the plaintiffs (husband and wife) filed suit against the City of Carlisle for injuries suffered by one of them in an auto

accident with another citizen whom they alleged should not have been permitted to maintain a driver's license. The driver who struck the plaintiff was a known epileptic prone to uncontrollable seizures. Plaintiffs asserted that the City violated their due process rights under the Fourteenth Amendment by failing to revoke the driver's license, when it was aware of the danger posed to other motorists. The Court rejected their claim, stating that the driver was no more a danger to the injured plaintiff than to any other citizen on the City's streets.

In *Kallstrom*, the Court again reiterated that a constitutional violation will only be found if "the state must have known or clearly should have known that its actions specifically endangered an individual." *Id.* The Court found that this element had been satisfied in the case before it only because the City of Columbus was alleged to have released the private information of certain undercover police officers to defense counsel in a case in which they were involved. The Court found that the City's actions placed the personal safety of the identified officers and their families in jeopardy, as distinguished from the public at large.

Plaintiff cites several cases that she asserts show that actions such as those alleged against these Defendant officers are actionable under the Fourteenth Amendment. However, each case is inapposite. In certain of the cases, liability was based upon the custodial exception, which does not apply here.[13] In other cases,

[13] *See Stemler v City of Florence*, 126 F.3d 856 (6th Cir. 1997), *cert. den.*, 523 U.S. 1118 (1998), and *Davis v Brady*, 143 F.3d 1021 (6th Cir. 1998), *cert. den.* 525 U.S. 1093 (1999).

from other jurisdictions, the courts applied a more liberal standard than is allowed in the Sixth Circuit. Those cases do allow liability to attach even if the known potential danger is to an identifiable group or the public at large.[14]

Two cases that are most factually analogous to the instant case are also distinguishable. In *Dwares v City of New York*, 985 F.2d 94 (2nd Cir. 1993), an individual who was beaten by "skinheads" while demonstrating at a rally involving flag burning, brought suit under the Fourteenth Amendment alleging that local officers allowed the beatings to take place. Plaintiff alleged that prior to the rally, the officers told the "skinheads" that they would not interfere with their planned harassment and assaults unless it got completely out of hand. Per the plaintiff, the officers also watched his beating without taking any action on his behalf.

The Court found that the Plaintiff had stated a claim. The Court stated that the case was distinguishable from *DeShaney*, because there, the petitioners conceded that the state played no part in creating the danger to the child. In *Dwares*, the officers did more than merely stand by. They provided "prearranged official sanction of privately inflicted injury," which the Court stated would obviously increase the likelihood that demonstrators would be assaulted. Per the Court, plaintiff's complaint, therefore, was that the officers actually made the demonstrators more vulnerable to assaults; they took affirmative

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[14] *See Currier v Doran*, 242 F.3d 905 (10th Cir. 2001), *cert. den.*, 534 U.S. 1019 (2001), *Dwares v City of New York*, 985 F.2d 94 (2nd Cir. 1993), and *Reed v Gardner*, 986 F.2d 1122 (7th Cir. 1993), *cert. den.*, 510 U.S. 947 (1993). Note that the *Kallstrom* Court actually acknowledged the *Reed* court's contrary standard. *Kallstrom*, 136 F.3d at 1066.

steps to aid and abet the deprivation of plaintiff's rights by allowing him to be subjected to prolonged assault in their presence.

Dwares is distinguishable, both on its facts and the standard applied by the Court. To the extent the officers were found liable because they failed to react on the plaintiff's behalf when he was being beaten in front of them, *Dwares* is factually distinguishable. In *Dwares*, a potential victim was readily identifiable. Here, at no point prior to the accident was the decedent distinguishable from the rest of the spectators and other citizens susceptible to danger that evening. To the extent the *Dwares* court imposed liability because the "skinheads" posed a threat in general, this standard is contrary to that applied in this Circuit; in the Sixth Circuit, the threat must be more than a general one to the public at large.

In *Nishiyama v Dickson County*, 814 F.2d 277 (6th Cir. 1987), suit was brought by the parents of a young woman killed by an inmate who had been regularly permitted to drive marked patrol cars and assist with police business, without supervision. During one such excursion, the inmate pulled their daughter over and murdered her. Prior to the decedent's death, there was evidence that the inmate was regarded as dangerous and had assaulted a woman in the past; the officers who allowed him to use the vehicle for jail-related purposes knew that he also used it for private purposes; and, the officers, even though advised that the inmate was pulling over motorists that evening, failed to do anything about it.

The Court found that the plaintiff stated a claim under the Fourteenth Amendment. The Court found that there was state action because: the officers had authority

to direct the inmate's actions; the range of potential victims (motorists who would obey direction from a marked patrol car, particularly those in the area the inmate was known to be stopping vehicles) was definable; and, the officers set in motion the forces that allowed the inmate to commit the crime. In effect, they facilitated the crime by giving him the means and opportunity. The Court then found that the officers breached their duty by their gross negligence, which the Court said was sufficient for liability to attach under the Fourteenth Amendment. The Court went onto say that the test under this standard is whether a state official "intentionally does something unreasonable with disregard [sic] to a known risk or a risk so obvious that he must be assumed to have been aware of it, and of a magnitude such that it is highly probable that harm will follow." 814 F.2d at 282.

Nishiyama does not state the current law applied in the Sixth Circuit. *Nishiyama* was decided prior to *DeShaney*. Although it has not been overruled, the Sixth Circuit has acknowledged that its holding that gross negligence is sufficient to establish a substantive due process claim likely does not survive *DeShaney*. *See Foy v Berea*, 58 F.3d 227 (6th Cir. 1995); *Lewellen v Metropolitan Gov't of Nashville and Davidson County, Tenn., supra*; *Stemler v City of Florence, supra*. The *Nishiyama* Court also allowed liability to attach despite the fact that the foreseeable danger was only to the public at large, which Judge Wellford pointed out in his dissent:

> There is no basis for this court to depart from Judge Martin's considered rationale, so recently stated in *Janan* [*v Trammell*, 785 F.2d 557 (6th Cir. 1988),] that absent an allegation of a "special relationship . . . between the criminal and the

> victim [illegible]etween the victim and the state," in this kin[illegible] situation, tragic as it is, no constitutional or §1983 cause of action is stated. This is so particularly when it is clear and uncontroverted that the unfortunate victim was in the same status as the public at large (or the motorists using the highways generally) potentially subject to random murder.

See 814 F.2d at 288-289.

Despite the tragic nature of this case and the egregiousness of the officers' alleged conduct, there is not a scintilla of evidence that the officers had any reason to believe that the decedent was in more danger on that evening than any other person on the street that night. Consequently, Plaintiff failed to satisfy a critical element of the "state-created danger" theory of liability. Hence, she has not shown that the alleged acts and omissions of the officers amounted to a constitutional violation. The question of qualified immunity need not be reached. *Saucier*, 533 U.S. at 200-202.

Plaintiff's §1983 claim against the City for failure to train also fails. Under *Monell v Department of Social Services*, 436 U.S. 658, 694 (1978), a government body may be held liable under §1983 for formal or informal customs or policies that result in constitutional deprivation. Plaintiff alleges that the City failed to implement policies and procedures for enforcement of Michigan's drag racing statute on city borders. By this inaction, Plaintiff says that the City established a policy, practice, or custom of allowing illegal drag racing activity to occur (i.e., the "hands off" policy), which caused and contributed to the officers' alleged violation of the decedent's Fourteenth Amendment rights.

However, Plaintiff has not made the requisite showing under the "state-created danger" theory to demonstrate a constitutional violation by the City. There is no evidence of an affirmative act by the City that either created or increased the risk that the decedent would be exposed to violence by a third party. In fact, Plaintiff's allegation is that the City *failed* to act in a manner that would have protected her from harm. The Sixth Circuit has explicitly rejected such claims: "[F]ailure to act is not an affirmative act under the state-created danger theory." *Cartwright*, 336 F.3d at 493. *See also Jones v Union County, Tennessee*, 296 F.3d 417 (6th Cir. 2002). Also, like the Defendant officers, there is no evidence that the City knew of or should have known that its alleged policy placed the decedent specifically at risk. Consequently, Plaintiff has not shown that Defendant City's alleged failure to train, via the alleged "hands off" policy, resulted in a constitutional violation.

In light of these findings, it is not necessary for the Court to consider Plaintiff's claim under 42 U.S.C. §1988, Defendant officers' claim that Plaintiff's claims are barred by res judicata, or the parties cross motions to strike.[15]

V. CONCLUSION

The Court GRANTS Defendant City of Lincoln Park and the Defendant Officers' Motions for Summary Judgment, DENIES Plaintiff's Motion for Summary Judgment, and deems MOOT the parties' respective motions to strike

[15] Plaintiff generically alleged in Count I that Defendants also violated the Fourth Amendment. However, Plaintiff presumably has abandoned any such claim as she offered no argument in support.

the affidavit of Linda Vertin. All claims against the City of Lincoln Park and the individual officers are dismissed in both cases.

IT IS SO ORDERED.

/s/ Victoria A. Roberts
VICTORIA A. ROBERTS
UNITED STATES
DISTRICT COURT

Dated: Sep. 17, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DOROTHY JONES,
as Personal Representative
of the Estate of DENISE
MICHELLE JONES, Deceased,

Plaintiff(s),

v.

AARON REYNOLDS, et al.,

Defendant(s).

Case No: 03-71770
Honorable
Victoria A. Roberts

CONSOLIDATED WITH:

DOROTHY JONES,
as Personal Representative
of the Estate of DENISE
MICHELLE JONES, Deceased,

Plaintiff(s),

v.

CITY OF LINCOLN PARK,
ET AL,

Defendant(s) /

Case No: 03-72418
Honorable
Victoria A. Roberts

JUDGMENT

(Filed Sep. 17, 2004)

In accordance with the Order entered on SEP 17, 2004 IT IS ORDERED that Judgment is entered in favor of Defendants City of Lincoln Park and Officers Kish, Lavis, Muncey and Nasser.

No. 04-2320

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOROTHY JONES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DENISE MICHELLE JONES, DECEASED, Plaintiff-Appellant, v. AARON REYNOLDS, ET AL., Defendants-Appellees.	)	ORDER

(Filed May 18, 2006)

BEFORE: MOORE and SUTTON, Circuit Judges; and BUNNING,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is

* Hon. David L. Bunning, United States District Judge for the Eastern District Judge for the Eastern District of Kentucky, sitting by designation.

denied. Judge Moore would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

MCLA § 92.4 – Entitled Police officers; powers; duties, provides as follows:

"Under the direction of the mayor and chief of police, and in conformity with the ordinances of the city and laws of this state, the police shall suppress riots, disturbances, and breaches of the peace; pursue and arrest a person fleeing from justice in any part of the state; apprehend a person in the act of violating a law of this state, or an ordinance of the city, involving a breach of the peace, and, unless the violation constitutes a civil infraction, take the offender before the proper court or magistrate, to be dealt with for the violation; make complaints to the proper officers and magistrates of any person known or believed by them to be guilty of the violation of the ordinances of the city or the penal laws of the state or to be responsible for a violation of an ordinance or law of this state designated as a civil infraction; diligently and faithfully to enforce all laws, ordinances, and regulations for the preservation of good order and the public welfare as the council may ordain; and serve process directed or delivered to them for service. For such purposes, the chief of police and every police officer have the powers of constables and may arrest, upon view and without process, a person in the act of violating an ordinance of the city involving a breach of the peace, unless the violation constitutes a civil infraction, or of committing a violation of a criminal law of this state. The chief of police and a police officer may serve and execute process in a proceeding for a violation of an ordinance of the city, and also any other process that a constable may serve."

MCLA § 750.478 – Willful neglect of duty; public officer or person holding public trust or employment; penalty.

"When any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every willful neglect to perform such duty, where no special provision shall have been made for the punishment of such delinquency, constitutes a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00."

A FIFTY STATE COMPENDIUM OF ASSUMPTION OF RISK CASES AND STATUTES

Alabama – Assumption of risk exists for negligence based claims, but a defendant asserting the defense must show that plaintiff (1) had knowledge of the existence of the dangerous condition; (2) had an appreciation of the danger; and (3) yet failed to exercise reasonable care by putting himself in the way of the known danger. ***Central Ala. Elec. Co-op v. Tapley*, 546 So. 2d. 371 (Ala. 1989).**

Alaska – Assumption of Risk not a complete bar, but rather just another factor that may reduce the plaintiff's recovery under principals of comparative fault. ***Hiibschman ex rel. Welch v. City of Valdez*, 821 P.2d 1354 (Alaska 1991).**

Arizona – Assumption of risk is comparative fault defense and defendant has burden of proving elements of defense, and jury decides if applies. ***Galindo v. TMT Transp. Inc.*, 152 Ariz. 434, 733 P.2d 631 (App 1986).**

Arkansas – The common law doctrine of assumption of risk is no longer applicable as separate theory in Arkansas, but definition contained in comparative fault statute. ***Ouachita Wilderness Inst. v. Mergen*, 329 Ark. 405, 947 S.W.2d 780 (1997)**

California – Assumption of risk requires knowledge of the particular risk and appreciation of its magnitude. ***Allabach v. Santa Clara County Fair Ass'n*, 46 Cal. App. 4th 1007, 54 Cal. Rptr. 2d 330 (1996).**

Colorado – Assumption of risk doctrine eliminated by legislature and considered element of plaintiff's comparative negligence. **Colo. Rev. Stat. 13-21-111.**

Connecticut – Assumption of risk doctrine abolished. **Conn. Gen. Stat section 14-100a section 52-572h.**

Delaware – Assumption of risk defense is permitted in all negligence cases, except strict liability. ***Latchford v. Schadt*, C.A. N. 232, 2002, 2001 WL 392254 (Del. Super. Ct. Apr. 11, 2001), rev'd on other grounds, 843 A.2d 689 (Del. 2004).**

District Of Columbia – Assumption of risk doctrine is a valid defense which bars claim of negligence, provided 1) plaintiff must engage in activity with knowledge of the risk and full appreciation of its dangers, and 2). the plaintiff's decision to incur the known risk must be free and voluntary, and question for jury – subject standard applied. ***Breheny v. Catholic Univ. of Am.*, 1989 U.S. Dist Lexis 14029 (D.D.C. Nov 22,1989).**

Florida – Assumption of risk doctrine does not bar action, but instead merged into Florida's comparative negligence scheme. ***Kenrick v. Ed's Beach Serv., Inc.*, 577 So. 2d 936 (Fla. 1991)**

Georgia – Assumption of risk is bar to negligence action if defendant proves plaintiff 1) actually knew of danger; 2) understood and appreciated the risks associated with such danger; and 3) voluntarily subject himself to the risk involved. ***Muldovan v. McEachern*, 271 Ga. 805, 807, 523 S.E.2d 566, 569 (1999).**

Hawaii – Assumption of risk remains as an affirmative defense in negligence actions and reduces plaintiff's recovery. ***Larsen v. Pacesetter Sys., Inc.*, 74 Haw. 1, 33, 837 P.2d 1273, 1290 (1992).**

Idaho – Assumption of risk is a viable affirmative defense only in cases involving an express assumption of risk,

whether oral or written. ***Salinas v. Vierstra*, 107 Idaho 984, 989-90, 695 P.2d 369, 374-75 (1985).**

Illinois – Assumption of risk is affirmative defense, but treated as type of contributory fault. ***Gratzle v. Sears, Roebuck & Co.*, Ill. [sic] App. 3d 292, 613 N.E.2d 802 (1993)**

Indiana – Assumption of risk referred to as incurred risk is no longer complete defense and subsumed in Comparative Fault Act. ***Mark v. Moser*, 746 N.E.2d 410, 414 (Ind. App. 2001).**

Iowa – Assumption of risk defense is subsumed within the Iowa Comparative Fault Act's definition of fault. **Section 668.1(1)**

Kansas – Assumption of risk is complete bar to recovery in negligence claim if proven the plaintiff 1) has knowledge and full appreciation of the risk caused by defendant's conduct. ***Calvert v. Garvey Elevators, Inc.*, 236 Kan. 570, 574, 694 P.2d 433, 437 (1985).**

Kentucky – Assumption of risk doctrine is not a valid defense to tort claims in Kentucky. ***Wallingford v. Kroger Co.*, 761 S.W.2d 621 (Ky. App. 1988)**

Louisiana – Assumption of risk defense does not exist, but fault of all persons causing or contributing to the injury must be assessed. **La. Civ. Code Ann. art. 2323.**

Maine – Assumption of risk doctrine has been abolished by the comparative negligence statute. ***Herzog v. Arthrocare Corp.*, 2003 U.S. Dist Lexis 5224 (D. Me. 2003)**

Maryland – Assumption of risk exists affirmative defense and the defendant must prove the plaintiff 1) had knowledge of the risk of danger, 2) appreciated the risk, and 3)

voluntarily confronted the risk of danger. ***ADM Partnership v. Martin*, 702 A.2d 730, 734 (Md. 1997).**

Massachusetts – Assumption of risk abolished by legislature as a defense to most actions. **Mass Gen. Laws ch. 231, Section 85.**

Michigan – Assumption of risk doctrine is still enforced if statutory. ***Bar v. Mt. Brighton, Inc.*, 546 N.W.2d 273 (1996)**; Although it has narrowed the scope, Michigan courts also continue to recognize the doctrine in work that involves fire protection, police, or security work. ***Marlis v. Fleur, Inc.*, 208 Mich App. 631, 528 N.W.2d 218 (1995) (off-duty police officer does not assume risk that former arrestee will assault him in a bar).**

Minnesota – Assumption of risk affirmative defense must be proven that plaintiff 1) knowledge of the risk; 2) an appreciation of the risk; and 3) a choice to avoid the risk but voluntarily chose to chance the risk. ***Andren v. White-Rodgers Co.*, 465 N.W.2d 102 (Minn. App. 1991).**

Mississippi – Assumption of risk has been abolished as complete defense and is subsumed in comparative fault doctrine. ***Horton v. American Tobacco Co.*, 667 So. 2d 1289 (Miss. 1995)**

Missouri – Assumption of risk defense: a plaintiff must actually know the real danger and must voluntarily and knowingly consent to assume that risk. ***Gamble v. Bost*, 901 S.W.2d 182 (Mo. Ct App 1995)**

Montana – Assumption of the risk is not available as a separate affirmative defense in negligence claims, and those cases where the court allows such a defense, knowledge of the specific danger that caused the plaintiff's

injury is required. ***Mead v. M.S.B., Inc.*, 264 Mont. 465, 477 872 P.2d 782, 790 (1994).**

Nebraska – Assumption of risk remains affirmative defense if shown 1) that the person knew of and understood the specific danger, 2) the person voluntarily exposed himself or herself to the danger, and 3) the person's injury or death or the harm to property occurred as a result of his or her exposure to the danger. ***Jay v. Moog Auto, Inc.*, 264 Neb. 875, 652 N.W.2d 872 (2002).**

Nevada – Assumption of risk has been subsumed in comparative negligence statute and is no longer a bar to negligence. ***Central Tel. Co. v. Fixtures Mfg. Corp.*, 103 Nev. 298, 738 P.2d 510 (1987)**

New Hampshire – Assumption of risk defense abolished in light of comparative fault rules. ***England v. Tasker*, 129 N.H. 467, 470, 529 A.2d 938, 940 (1987)**

New Jersey – Assumption of risk defense, knowledge of risk and comparative fault rules apply. ***Lewis v. American Cyanamid Co.*, 155 N.J. 544, 715 A.2d 967 (1998)**

New Mexico – Assumption of risk defense abolished to negligence actions. ***Williamson v. Smith*, 83 N.M. 336, 491 P.2d 1147 (1971)**

New York – Assumption of risk no longer complete bar to recovery – requires 1) knowledge or an appreciation of risk and acceptance of consequences by continued participation in the activity. ***Mesick v. State*, 118 A.D.2d 214, 504 N.Y.S.2d 279 (3d Dep't 1986)**

North Carolina – Assumption of risk is affirmative defense if defendant proves 1). plaintiff is aware of a known danger, has an opportunity to avoid the known danger, 2).

fails to avoid the known danger. ***Davies ex rel. Hardy v. Lewis*, 133 N.C. App. 167, 514 S.E.2d 742, rev. denied, 350 N.C. 827, 537 S.E.2d 819 (1999).** Assumption of risk does not bar recovery where defendant's conduct is found to be wanton or willful. ***King v. Allard*, 76 N.C. App. 427, 333 S.E.2d 758, rev. denied, 315 N.C. 184, 337 S.E.2d 857 (1985).**

North Dakota – The legislature's adoption of the doctrine of comparative negligence abolished the affirmative defense of assumption of risk. ***First Trust Co. Of N.D. v. Scheels Hardware & Sports Shop, Inc.*, 429 N.W.2d 5 (N.D. 1988).**

Ohio – Assumption of risk may be asserted as a defense to a negligence claim, but it is an element of contributory fault and will not operate as a complete bar unless the percentage of fault attributed to the plaintiff for his assumption of the risk is greater than the total percentage of the negligence attributed to all parties from whom he seeks recovery and those from whom he does not. **Ohio Rev. Code 2307.011(B), 2315.33, 2315.35.**

Oklahoma – Assumption of risk is defense if proven plaintiff exposed himself to injury with a knowledge and appreciation of the danger and risk involved. ***Thomas v. Holliday By and Through Holliday*, 764 P.2d 165, (1988).**

Oregon – Implied assumption of risk has been abolished in Oregon. Express assumption of risk remains a viable affirmative defense. **Or. Rev. State. 31.620(2).** However, such conduct is compared with the conduct of the defendant under the comparative fault analysis. ***Blair v. Mt. Hood Meadows Dev. Corp.*, 291 Or. 293, 301, 630 P.2d 827 (1981).**

Pennsylvania – Assumption of risk is defense if proven plaintiff's subjective understanding of the risk, voluntary choice to encounter the risk, and willingness to accept that risk. ***Barnes v. American Tobacco Co.*, 984 F.Supp. 842, 869 (E.D. Pa. 1997).**

Rhode Island – Assumption of risk is defense if plaintiff knew of and understood the extent of the risk he/she incurred and voluntarily exposed himself/herself to that risk based on what the plaintiff in fact saw, knew, understood, and appreciated. ***Imbruglio v. Portsmouth IGA, Inc.*, 747 A.2d 1011, 1012-13 (R.I. 2000).**

South Carolina – Assumption of risk is considered as another factor in determining comparative negligence, rather than as an absolute bar to recovery. ***Davenport v. Cotton Hope Plantation Horizontal Prop. Regime*, 333 S.C. 71, 508 S.E.2d 565 (1998).** To establish the defense a defendant must prove 1. plaintiff had knowledge of the facts constituting a dangerous condition; 2). the plaintiff must know the condition is dangerous; 3) the plaintiff must appreciate the nature and extent of the danger; and 4). the plaintiff must voluntarily expose himself to the danger.

South Dakota – Assumption of risk is defense if proven 1. plaintiff must have actual or constructive knowledge of risk; 2) plaintiff must appreciate the character of the risk; and 3) plaintiff must appreciate the character of the risk; plaintiff must have "voluntarily accepted the character of the risk. ***Ray v. Downes*, 576 N.W.2d 896, 897 (S.D. 1998).**

Tennessee – Consistent with the comparative fault system, the plaintiff's conduct in confronting a known danger is to be considered by the trier of fact when apportioning fault. ***Perez v. McConkey*, 872 S.W.2d 897, 906 (Tenn. 1994).**

Texas – Plaintiff's assumption of risk is considered as a comparative responsibility factor. ***Farley v. M. M. Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975)**

Utah – Assumption of risk may be considered as fault by the plaintiff under comparative fault scheme. **Utah Code 78-27-37(2); *Jacobson Constr. Co. v. Structo-Lite Eng'g, Inc.*, 619 P.2d 306, 309 (Utah 1980).**

Vermont – Assumption of risk is subsumed in comparative fault scheme. ***Perkins v. Windsor Hosp. Corp*, 142 Vt. 305, 310, 455 A.2d 810, 814 (1982)**

Virginia – Assumption of risk is defense if proven plaintiff fully understood the nature and extent of the risk, appreciated the risk and plaintiff must voluntarily elect to incur the risk. ***Greater Richmond Transit Co. v. Wilkerson*, 242 Va. 65, 406 S.E.2d 28 (1991)**

Washington – Assumption of risk is a defense if proven the plaintiff's subjective understanding of the risk, voluntary choice to encounter the risk, and willingness to accept that risk. ***Home v. North Kitsap Sch. Dist.*, 92 Wash. App. 709, 720, 965 P.2d 1112 (1998).**

West Virginia – Assumption of risk is a defense and subsumed in comparative fault scheme. ***King v. Kayak Mfg. Corp*, 387 S.E.2d 511, 517 (W. Va. 1989)**

Wisconsin – Assumption of risk is framed in terms of comparative negligence principles. ***Polsky v. Levine*, 73 Wis. 2d 547, 243 N.W.2d 503 (1974).**

Wyoming – Assumption of risk is subsumed in comparative fault statute. **Wyo. Stat. 1-1-109(b)**

FILED
DEC 13 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-529

In the Supreme Court of the United States

DOROTHY JONES, as personal representative of the estate of Denise Michelle Jones, deceased,
Petitioner,

v.

WILLIAM KISH, III; Joseph Lavis; Douglas Muncey; and Mohamed Nasser,
Respondents.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Has Petitioner shown compelling reasons for review where, contrary to her assertions, she has failed to demonstrate a conflict between the circuits or any question requiring Supreme Court consideration?

II. Has Petitioner shown compelling reasons for review where, regardless of the resolution of the questions she has presented, she cannot prevail as she has ignored other requisites for application of the "danger creation" exception in the Sixth Circuit?

III. Has Petitioner shown compelling reasons for review where, regardless of the resolution of the questions she has presented, she cannot prevail as she has ignored respondents' defenses of qualified immunity (by failing to address the question of "clearly established law") and res judicata?

IV. Has Petitioner shown compelling reasons for review where she is presenting new theories of liability which were not presented or preserved in the courts below?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The City of Lincoln Park, Aaron Reynolds, and Mustapha Atat, were each named as defendants in the district court, and the City of Lincoln Park was also a named appellee in the circuit court. Petitioner has not included these parties in the pending Petition.

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BRIEF IN OPPOSITION

SUMMARY OF REASONS TO DENY THE PETITION

In order to prevail on her 42 U.S.C. §1983 claim, it was necessary for petitioner to identify a relevant constitutional right that was clearly established on October 8, 2001, the date she was injured while observing a drag race. The Sixth Circuit held that she was unable to satisfy the requisites of a §1983 claim, and unable to avoid the respondents' qualified immunity from suit. Yet, seeking review from this Court, petitioner attempts to shift her theory of liability from the "danger creation" theory advanced in her Complaint and addressed by the district and circuit courts, to a "direct injury" theory raised for the first time to this Court, while she ignores her burden to demonstrate the existence of a clearly established constitutional right under either theory. She also ignores respondents' defense of res judicata and the consequences of the final judgment entered in a state proceeding instituted by petitioner seeking redress for the same injury and the same conduct she complaints of in this case. Thus, and regardless of the merits of the arguments now advanced by petitioner, she cannot prevail and her Petition should be denied. Moreover, petitioner's claim is properly analyzed pursuant to the dictates of *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), and the Sixth Circuit properly applied both *DeShaney* and its own precedent when it held, *inter alia*, that respondents' conduct did not constitute an affirmative act that had either created or increased the risk to which petitioner was exposed as an observer of a drag race.

Contrary to petitioner's assertions, precedent from other circuits, including the Second, Fourth and Ninth Circuits, is consistent with the reasoning advanced by the Sixth Circuit, and the tests applied by those circuits who have adopted a "danger creation" exception to the general rule enunciated in *DeShaney* are consistent with the test applied by the Sixth Circuit. Premised on the language of *DeShaney*, the conduct of the state actor must either create a new danger, or increase an existing danger, and petitioner had alleged no conduct that satisfies this requirement.

As Petitioner has failed to suggest compelling reasons to support the granting of her Petition, it should be denied.

STATEMENT OF THE CASE

During the early morning hours of October 8, 2001, Denise Jones was among a crowd of persons observing a drag race taking place in the City of Detroit, on the border of Detroit and the City of Lincoln Park, when the driver of one of the vehicles, Aaron Reynolds, lost control of his vehicle and struck Ms Jones. Respondents, William Kish, III, Joseph Lavis, Douglas Muncey and Mohamed Nasser, were police officers employed by the City of Lincoln Park who were present during the race.[1] On May 8, 2003, petitioner, Dorothy Jones, as Personal Representative of the Estate of Denise Michelle Jones, deceased, commenced this litigation in the United States District Court for the Eastern District of

[1] A detailed recitation of the underlying facts, taken in the light most favorable to petitioner, is set forth in the Sixth Circuit opinion. Pet. App. 2, *et seq.*

Michigan. Ct. App. JA 18. Petitioner sought to impose liability on respondents under 42 U.S.C. §§ 1983 and 1985 for fatal injuries suffered by Denise Jones when she was struck by a vehicle engaged in an illegal drag race on the public street. She complained that the respondents were police officers who were present during the drag race, but who failed to take any steps to stop it, and approved and encouraged it. Count I, entitled "Conspiracy", complained that the respondent police officers conspired with the drivers, Aaron Reynolds and Mustapha Atat, to violate Michigan's drag race statute, M.C.L. 257.626a, and that they did so for the purpose of depriving persons of the equal protection of the law in violation of 42 U.S.C. §1985(3). Ct. App. JA 27. Count II asserted a cause of action under 42 U.S.C. §1983, and alleged that the actions of the respondents violated Denise Jones' rights under the Fourth and Fourteenth Amendments. Ct. App. JA 29. Count III asserted a cause of action under 42 U.S.C. §1983 against the City of Lincoln Park. Ct. App. JA 32. In response to this Complaint, respondents filed an Answer and Affirmative Defenses which included, *inter alia*, the affirmative defenses of qualified immunity and res judicata. Ct. App. JA 108.

Prior to the commencement of this federal action, on December 20, 2001, petitioner had also commenced suit in Wayne County Circuit Court, seeking to impose liability for Denise Jones' death on respondents, premised on causes of action allegedly arising under Michigan law. Ct. App. JA 161. A final judgment was entered in the state action on August 8, 2003, and petitioner appealed that judgment to the Michigan Court of Appeals, which affirmed the judgment on April 7, 2005, in Case #250616. Res. App. A at 1a. Petitioner's motion for reconsideration was denied by the Michigan Court of Appeals on June 17, 2005, and her Application for Leave to Appeal to the Michigan Supreme

Court was denied in Case #129133 on February 27, 2006. Res. App. B at 35a, Res. App. C at 36a.

In this federal action, respondents sought summary judgment in the district court on the bases that, taking the evidence in the light most favorable to petitioner, there was no genuine issue of material fact that petitioner's claims failed to implicate the deprivation of any constitutional right, that respondents were entitled to qualified immunity from suit as to any arguably implicated constitutional right, and that this litigation was barred by the doctrine of res judicata. Ct. App. JA 372. This motion was granted in an opinion released on September 17, 2004. Ct. App. JA 43. The district court held that petitioner had failed to establish the requisites for a cause of action under 42 U.S.C. §1985 because of the absence of any proof of class-based animus. Ct. App. JA 53-55. As to petitioner's claim under 42 U.S.C. §1983, the district court held inapplicable the "state created danger" exception to the general rule set forth in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), as recognized by the Sixth Circuit Court of Appeals in, for example, *Cartwright v. City of Marine City*, 336 F.3d 487 (6th Cir. 2003), and *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998). As petitioner had not shown that respondents had engaged in unconstitutional conduct, she had failed to overcome the first inquiry into the respondents' assertion of qualified immunity.

The judgment of the district court was affirmed on petitioner's appeal, and her motion for a rehearing en banc was denied. Pet. App. 1, 71. Citing *DeShaney, supra.*, the Court summarized: "Because the officers did not have custody of Denise Jones at the time of the accident, because the officers' actions did not place Denise Jones in any more danger than she voluntarily undertook before they arrived and

because the officers' participation in this tragedy did not specially place Denise Jones at any more risk than the 150-300 people attending the drag race, all relevant precedent requires us to uphold the judgment of the district court summarily rejecting this constitutional claim." Pet. App. 2-3. Further addressing the respondents' claim of qualified immunity, the Court held that petitioner had failed to demonstrate a violation of 'clearly established' constitutional rights. Pet. App. 23.

Petitioner does not address the issue of "clearly established" law in her Petition, beyond her conclusory assertion in the Statement of Facts that the respondents would not be entitled to qualified immunity, asserting that "[t]his case involves the abuse of authority." Pet. at 4.[2] Nor is respondents' affirmative defense of res judicata addressed by petitioner, although this defense was presented to the Sixth Circuit for its consideration.

Moreover, notwithstanding Petitioner's apparent desire to change her theory of liability, as evidenced by her assertions that she "does not claim the Respondent police officers had a duty to protect her under the Fourteenth Amendment" (Pet. at 6-7), and that she "has never claimed the police officers failed to protect her or the Constitution creates a duty to protect" (Pet. at 8), her Complaint relied on a failure to protect theory to support her §1983 claim. It alleged that "[e]ach Defendant had the duty and the opportunity to protect the decedent from the unlawful actions of the other Defendant but each Defendant failed and refused to perform such duty,

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[2] Thus, she has failed to sustain her burden of overcoming respondents' qualified immunity. *Brousseau v. Hagen*, 543 U.S. 194 (2004); *Saucier v. Katz*, 533 U.S. 194 (2001).

thereby proximately causing the decedent's death and Plaintiff's injuries." Ct. App. JA 20, ¶13. It further alleged that the respondents "failed to use their police vehicle to prevent the drag race from taking place by driving through the stretch of road or flashing their lights, or even using the public address system to warn the drag race participants, instead of blaring rap music, 'Everybody Should Be Living It Up', to parade and cheer for the event to occur." Ct. App. JA 24, ¶42. Further, and of particular note, the issue raised against respondents by petitioner before the Sixth Circuit Court of Appeals, as stated in her Appellant's Brief, page 1, was "[w]hether Plaintiff was entitled to summary judgment or jury question for Fourteenth Amendment substantive due process claim that state actors created danger, in violation of 42 U.S.C. 1983, which resulted in death of decedent, where Defendants stipulated to Plaintiff's facts."

Accordingly, the Petition ignores issues raised below which are critical to petitioner's position, such as the existence of "clearly established" law, while advancing theories which were previously neither pled nor argued.

REASONS FOR DENYING THE PETITION

Petitioner questions the Sixth Circuit's analysis of her Fourteenth Amendment substantive due process claim, and specifically its conclusion that the principles enunciated in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989) supported the dismissal of her claim. In *DeShaney, supra.*, the Court rejected the plaintiff's argument that Joshua DeShaney's Fourteenth Amendment due process rights had been violated by the State when it failed to protect him against his father's violence. In so holding, the

Court observed that the due process clause was "phrased as a limitation on the State's power to act, not as a guarantee of certain minimum levels of safety and security"; that the clause "generally confer[red] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual"; and that "[i]f the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them." *DeShaney,* 489 U.S., 195, 196-197. The *DeShaney* Court did recognize that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals" (489 U.S., 198), but explained that these circumstances involved situations where the State had either actual or functional custody of the plaintiff, thereby preventing him from taking action to protect himself (489 U.S., 200).

Petitioner has never contended that this case falls within this "custody" exception but, rather, has relied on a "creation of danger" exception, derived wholly from the *DeShaney* Court's statement that "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." 489 U.S., 201. Premised on these few words, the Sixth Circuit has recognized an exception to the general rule enunciated in *DeShaney*, applicable only where the State has either created the danger itself or, where, by its actions, it has placed a plaintiff in a position worse than she would have been in had there been no State action at all. *Bukowski v. City of Akron*, 326 F.3d 702 (6th Cir. 2003); *Cartwright v. City of Marine City*, 336 F.3d 487 (6th Cir.

2003).[3] In the case at bar, the Sixth Circuit applied this precedent, including the three-part test enunciated in *Cartwright, supra.*, 336 F.3d, 493:

> To show a state-created danger, plaintiff must show: 1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; 2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as

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[3] Other Circuits have also adopted variations of this "state created danger" exception. For example, in *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1062-1064 (9th Cir. 2006), the Ninth Circuit noted that it had first recognized "danger creation liability" in *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), which liability included the requirement that the state actors have placed the plaintiff in danger that she would not otherwise have faced. Similarly, in *Windle v. City of Marion*, 321 F.3d 658, 661-662 (7th Cir. 2003), the Seventh Circuit discussed the "state created danger exception" and its requirement of an affirmative act that created or increased the danger faced by the plaintiff. In *Davis v. Fulton County*, 90 F.3d 1346, 1351 (8th Cir. 1996), the Eighth Circuit noted that it had recognized a duty to protect "when the state affirmatively places a particularized individual in a position of danger that she would not otherwise have faced." In *Morse v. Lower Merion School District*, 132 F.3d 902, 908 (3rd Cir. 1997), the Third Circuit expressed its four-part test, which included the requirement that the state actors have used their authority to create an opportunity for crime that would not otherwise have occurred. In *Ruiz v. McDonnell*, 299 F.3d 1173, 1182-1183 (10th Cir. 2002), the Tenth Circuit noted its six-part test for satisfying the danger creation exception, including the requirements that the state actors created or increased the plaintiff's vulnerability to the danger, and that the plaintiff be a member of a limited and specifically definable group.

> distinguished from a risk that affects the public at large; and 3) the state knew or should have known that its actions specifically endangered the plaintiff. * * *

The court below held that these requirements could not be satisfied in the circumstances of this case. As to the first requirement (the only one that petitioner addresses), the court concluded that allegations directed against respondents did not constitute an affirmative act that either created or increased the risk to Denise Jones because, although respondents could have prevented the race from taking place, "[n]o evidence indicates that the drag race would not have proceeded had the officers never arrived, and no evidence indicates that the officers' actions, whether characterized as allowing the race to proceed or as encouraging it, increased the risk to spectators at the race in general or to Jones in particular." Pet. App. 12. "'The question is not whether the victim was safer *during* the state action, but whether [she] was safer *before* the state action than [she] was *after* it.'" Pet. App. 11-12. This analysis is wholly consistent with the observation in *DeShaney, supra.*, 489 U.S., 201: "That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been in had it not acted at all." In the case at bar, Denise Jones was in no worse position than if the respondents had not acted at all because, in either case, the drag race would have occurred. This is not a situation where the race had already been called off before the officers arrived. Had there been no state action at all, if the officers had never appeared, it is indisputable that there would still have been a race.

The Sixth Circuit also held that since Denise Jones was not specifically at risk, the second requisite for application of the state created danger exception was not satisfied. As noted

by the Court, "[a] special danger exists 'where the state's actions place the victim specifically at risk, as distinguished from a risk that affects the public at large.'" Pet. App. 20. The court noted that there were at least 150 persons observing the race, that respondents had never interacted with Denise Jones, and that there was no evidence that respondents "had any reason to know that they were putting her at risk by their action/inaction that night." Pet. App. 22.

Petitioner has asked this Court to consider the Sixth Circuit's opinion, principally complaining that it should have considered respondents' conduct as satisfying the requirement for "affirmative state action," but without explaining how she could overcome the other deficiencies in her claim.

I. The question of Sixth Circuit application of its own precedent does not warrant Supreme Court review.

Petitioner does not question the propriety of the danger creation exception as formulated by the Sixth Circuit in *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998), *Bukowski v. City of Akron*, 326 F.3d 702 (6th Cir. 2003) and *Cartwright v. City of Marine City*, 336 F.3d 487 (6th Cir. 2003). Rather, she complains that the Court did not properly apply that precedent in this case when it failed to recognize the respondents' conduct as "affirmative state action." This question was not deemed to merit an *en banc* review by the Sixth Circuit, and it does not raise a compelling issue requiring Supreme Court review.

II. Regardless of the Answers to the Questions Presented in the Petition, Petitioner Cannot Prevail.

A. The Petition focuses on only one phrase utilized in the first of a three-part test required for application of the "danger creation" exception.

While petitioner focuses her attention on the meaning of "affirmative state action" as used when assessing danger creation liability, the critical question pertains less to the characterization of the conduct as "affirmative," and more to the question whether that conduct caused or increased the danger. As noted by the Sixth Circuit, when discussing the requisite of an affirmative act: "Whether the conduct of the government officials in some cases should be treated as a failure to act or as action 'may be a difficult question in the abstract,'. . . but we have always treated governmental conduct as 'fall[ing] on the inaction side of the line,' . . . when it does not create or increase the risk of peril posed by the private actor. . . . [W]hen state action or inaction 'neither increase[s] decedent's risk of harm nor render[s] her more vulnerable,' . . . the plaintiff cannot establish a cognizable 'affirmative act'." [citations omitted] Pet. App. 10-11. Plaintiff does not meaningfully address this critical question, other than to suggest that the conduct of the private parties, Reynolds and Atat, should be imputed to respondents.[4]

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[4] There was no desire by either the public or private actors to deprive petitioner of her constitutional rights, and petitioner's allegations of conspiracy and concert of action may not be used to transform the circumstances of this case into a constitutional tort. Petitioner has complained below that the respondents' conduct constituted a violation of Michigan's drag racing statute, M.C.L. 257.626a, which renders drag racing a violation of the Motor

Indeed, petitioner's complaint that the Sixth Circuit relied on an "assumption of risk" analysis misreads the import of the court's analysis. It is undisputed that Denise Jones was voluntarily present at the drag race, and there is no evidence that her presence was related to the presence of the officers. Accordingly, it is impossible on this record to conclude that it was the conduct of the respondents that exposed her to the dangers attendant to her voluntary presence at the drag race.

Nor does petitioner address the second and third tests articulated in Sixth Circuit precedent, which require both the showing of "a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large," as well as a showing that "the state knew or should have known

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Vehicle Code. However, even were petitioner's interpretation of Michigan law correct, 42 U.S.C. §1983 provides a remedy for the violation of rights created by federal law, and the violation of state statutory or common law does not give rise to a cause of action under §1983 unless the conduct which violates state law also implicates federal rights. *Collins v. City of Harker Heights*, 503 U.S. 115, 119 (1992). Allegations of a conspiracy to violate a state statute do not state a claim under §1983. As stated by the 10th Circuit in *Dixon v. City of Lawton*, 898 F.2d 1443, 1449 (10th Cir. 1990), ". . . in addition to proving an agreement, plaintiff was required to prove an actual deprivation of a right 'secured by the Constitution and laws.' . . . This is because the essence of a §1983 claim is the deprivation of the right rather than the conspiracy." The complained of agreement must be one intended to violate another's constitutional right and not simply an agreement to act together in some fashion. An agreement to allow, encourage, or even participate in a drag race on the public streets would not constitute a conspiracy to violate someone's constitutional rights because drag racing is not, itself, constitutionally tortious, and there was no intent or agreement to injure another.

that its actions specifically endangered the plaintiff." The Sixth Circuit concluded that the record failed to support either of these requisites which, standing alone, supported the dismissal of petitioner's §1983 claim. Petitioner's failure to address these issues also support the denial of her pending Petition.

B. The Petition does not address the existence of the "clearly established law" required to overcome respondents' qualified immunity.

Even when a relevant constitutional right is implicated by a plaintiff's allegations, government officials sued pursuant to 42 U.S.C. §1983 are entitled to a dismissal pursuant to the doctrine of qualified immunity unless the plaintiff is able to demonstrate that the right was clearly established at the time of its alleged deprivation. *Anderson v. Creighton*, 483 U.S. 635 (1987); *Saucier v. Katz*, 533 U.S. 194 (2001); *Brousseau v. Hagen*, 543 U.S. 194 (2004).[5] The Sixth Circuit held that petitioner was unable to do so in this case.

> Even if there were doubt about these conclusions, it is clear at a minimum that Jones has not shown a violation of constitutional rights that were 'clearly established' at the time of the officers' action/inaction. No authority from our circuit extant at the time of the

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[5] In *Brousseau, supra.*, 543 U.S., 599, the Court explained that "[i]f the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation." Moreover, quoting from *Saucier, supra.*, 533 U.S., 201, the *Brousseau* Court reiterated, 543 U.S., 599, "[i]t is important to emphasize that this inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'"

> incident even begins to suggest that the 150 people at the drag race would satisfy the "special danger" requirement. And no authority from our circuit supports the theory that the officers committed a cognizable affirmative act when they did not create or increase the danger to Denise Jones that she voluntarily undertook before they arrived.

Pet. App. 23. Yet, petitioner has neither presented the question of "clearly established law" as a Question Presented on her Petition, nor developed any reasoned argument concerning it. Accordingly, even if this Court were to determine that the circumstances of this case implicated a substantive due process violation, respondents would be entitled to summary judgment premised on their qualified immunity because that right was not clearly established on October 8, 2001, and, as the Sixth Circuit held, petitioner failed to sustain her burden of demonstrating otherwise.

C. The Petition does not address respondents' asserted res judicata defense.

On December 20, 2001, petitioner brought a state court action against respondents, asserting claims based on the same underlying facts and conduct she alleged in this case. Ct. App. JA 161. That state litigation resulted in a final judgment on August 8, 2003, which judgment was affirmed on appeal. Res. App. A at 1a. Thus, in their motion for summary judgment, respondents argued that even were petitioner otherwise able to proceed with her federal claim, it was barred by the doctrine of res judicata, which precludes a party from splitting her cause of action and bars subsequent relitigation based on the same transaction or event. *Pierson Sand and Gravel, Inc. v. Keeler Brass Co*, 460 Mich. 372, 380; 596 N.W.2d 153 (1999). Having found no viable §1983

claim, neither of the courts below had need to consider this alternate basis supporting summary judgment. However, the Petition has ignored this affirmative defense, which precludes the relief she seeks in her Petition.

Federal courts honor the res judicata effects of state court judgments under the full faith and credit statute, 28 U.S.C. §1738. To that end, the preclusive effect of a prior state court judgment is governed by the law of that state. Michigan law applies the broad rule of res judicata, which precludes "a subsequent litigation based upon the same transaction or events. . . ." *Pierson Sand and Gravel, supra.*, 460 Mich., 380, 596 N.W.2d, 157 . "The test for determining whether two claims arise out of the same transaction and are identical for res judicata purposes is whether the same facts or evidence are essential to the maintenance of the two actions." *Jones v. State Farm Mutual Auto Ins. Co.*, 202 Mich. App. 393, 401; 509 N.W.2d 824, 834 (1994). Further, in Michigan, "[r]es judicata applies when (1) the prior action was decided on the merits, (2) the decree in the prior decision was a final decision, (3) both actions involved the same parties or their privies, and (4) the matter in the second case was or could have been resolved in the first." *Ditmore v. Michalik*, 244 Mich. App. 569, 576; 625 N.W.2d 462, 466 (2001). Each of these elements was satisfied in this case, and the same facts and evidence were essential to the maintenance of both actions.

The Petition fails to address this affirmative defense which defeats petitioner's claim.

III. The Sixth Circuit's Decision Does Not Conflict With the Analyses of the Second, Fourth or Ninth Circuits.

Petitioner contends that the Sixth Circuit's application of its danger creation exception, and specifically its analysis of the conduct that constitutes an "affirmative act", is inconsistent with opinions of the Second, Fourth, and Ninth circuits, citing *Kennedy v. City of Ridgefield*, 411 F.3d 1134 (9th Cir. 2006); *Dwares v. City of New York*, 985 F.2d 94 (2nd Cir. 1993), and *Meeker v. Edmundson*, 415 F.3d 317 (4th Cir. 2005).[6] Although not specifically referenced in her Questions Presented, petitioner also cites the Seventh circuit opinion in *Reed v. Gardner*, 986 F.2d 1122 (7th Cir. 1993). However, these decisions are distinguishable on their facts. In *Kennedy, supra.*, 411 F.3d, 1063, the Ninth Circuit found that the state actor had "affirmatively created an actual, particularized danger Kennedy would not otherwise have faced" when he failed to warn that plaintiff's neighbor had been advised of plaintiff's allegations of child molestation. Thus, the state action had, at least, altered the risk presented by the neighbor and deprived plaintiff of the opportunity to take precautions. In *Dwares*, the police increased an existing danger of assaults on individuals exercising their First Amendment rights, while in *Reed*, the police either created or increased the danger that the drunk passenger would drive the

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[6] Perhaps notably, petitioner does not contend that the legal principles enunciated by the Sixth Circuit are in conflict with legal principles enunciated by other circuits, but merely asserts that other circuits would have applied these principles differently. Even were it true, this would not present a compelling question for this Court's review.

car after they removed the sober driver.[7] In the case at bar, the respondents' presence at the scene of the drag race did neither. Likewise, petitioner's citation of *Meeker* is inapposite. *Meeker, supra.*, did not involve application of a rule regarding danger creation liability, but was a direct injury claim, where, as explained by the Fourth Circuit, the defendant state actor had actively employed a private party to violate the plaintiff's constitutional right to be free of malicious corporal punishment. ". . . Meeker's complaint asserts that Coach Edmundson used students as his '*instruments*' to abuse Meeker." 415 F.3d, 322.[8]

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[7] Responding to petitioner's citation of *Dwares, supra.*, and *Reed, supra.*, the Sixth Circuit appropriately noted that "[b]oth cases . . . involved victims who faced little danger before the police intervened and greater peril after the police acted." Pet. App. 16-17.

[8] Indeed, both *Dwares* and *Meeker* are otherwise distinguishable from the case at bar because, whether viewed from a danger creation perspective, or a direct injury analysis, in both cases the state actors had been the direct cause of a constitutional violation by soliciting or encouraging another to engage in conduct that, if engaged in by a state actor, would have been unconstitutional. In *Dwares, supra.*, the police officers encouraged private parties to assault the plaintiff while he was exercising his First Amendment rights. Thus, the officers were directly liable for the First Amendment violation. Likewise, *Meeker, supra.*, concerned the constitutional right to be free from malicious corporal punishment, and the liability of the defendant coach was based on his direct liability for his role in instigating and directing the beating administered by others. In both the *Dwares* and *Meeker* cases, the encouraged conduct was, itself, violative of the plaintiff's constitutional rights, and the state actors had actively employed a private party to accomplish this end on their behalf. In the case at bar, the encouraged conduct was simply drag racing. Nor were the private parties engaged as the alter egos of the officers.

To the extent that the danger creation requirements differ from circuit to circuit, the differences are not meaningful to the circumstances of the case at bar, where petitioner is unable to satisfy the minimum requirement that the conduct of the state actor serve to either create a new danger, or increase the risk of an existing one.

IV. Petitioner Did Not Present or Preserve a "Direct Injury" Claim in the Lower Courts, Which Claim Could Not, in Any Event, Succeed.

In its Opinion, the Sixth Circuit distinguished the circumstances of this case from "direct injury" claims controlled by *County of Sacramento v Lewis*, 523 U.S. 833 (1998):

> * * * Had the officers organized or participated in this race, the issue would cease to turn on whether they were responsible for harm caused by a private actor and would turn instead on whether they had caused the harm themselves. *See County of Sacramento v Lewis*, 523 U.S. 833, 849, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (noting that officers will be liable under the Due Process Clause for injuries caused by "grossly negligent" or "reckless" conduct that "shock[s] the conscience").
>
> Under these circumstances, we would have no reason to determine whether the officers had increased the risk of harm to the victim because they would be *the source* of that risk. Here, however, Jones has not alleged that the officers had anything to do with the organization of the race or that they participated in it. All of which explains why plaintiff has not presented

> this case as one in which the officers directly harmed Denise Jones but rather as one in which they allowed private actors to harm her. * * *
>
> * * *
>
> * * * While we decline to extend the [state created danger] doctrine in this case, nothing in our decision prevents future litigants from arguing what the plaintiff has not argued here – that the alleged actions of the officers converted the private misconduct of the drivers into public misconduct and in the process converted this claim into a direct-injury constitutional claim under the *Lewis*, as opposed to *DeShaney*, line of cases.

Pet. App. 17-18, 25.

In apparent response to this discussion, petitioner now asserts that which was never asserted before – that respondents "participated in the planning and preparation taking place for the illegal drag race" and "actively participated in the illegal drag race". Pet. at 2. To the extent that petitioner seeks now to convert her claim into a direct injury claim under *Lewis*, she has failed to preserve it in either of the courts below. Moreover, and as the Sixth Circuit observed, there are neither allegations nor facts to support such a claim, and plaintiff's reliance on tort principles does not cure this defect or advance her legal position.

As noted in *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992), the Supreme Court has "always been reluctant to expand the concept of substantive due process." However, in recognition of the need to protect the individual from the arbitrary exercise of unrestrained governmental

power, the Court has recognized the existence of both procedural and substantive due process rights. The substantive rights are quite circumscribed, as the Court explained in *Lewis, supra.*, 523 U.S., 846:

> Our cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be "arbitrary in the constitutional sense," *Collins v Harker Heights*, 503 U.S., at 129, thereby recognizing the point made in different circumstances by Chief Justice Marshall, "'that it is *a constitution* we are expounding.'" * * * Thus, in *Collins v Harker Heights*, for example, we said that the Due Process Clause was intended to prevent government officials "' "from abusing [their] power, or employing it as an instrument of oppression."'" * * * [citations omitted]

Of course, the circumstances of the case at bar are not about the exercise of governmental power, but about the failure to exercise such power. Thus, the appropriate analysis is the one arguably provided by *DeShaney, supra.*

Moreover, noting that "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level" (523 U.S., 849), the *Lewis* Court recognized that some lesser standard might apply in some circumstances, but cautioned against simply transforming tortious conduct into unconstitutional conduct, 523 U.S., 848:

> * * * Thus, we have made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm. In *Paul v Davis*, 424

> U.S. 693, 701; 96 S.Ct. 1155, 1160-1161; 47 L.Ed.2d 405 (1976), for example, we explained that the Fourteenth Amendment is not a "font of tort law to be superimposed upon whatever systems may already be administered by the States," and in *Daniels v Williams*, 474 U.S., at 332, we reaffirmed the point that "[o]ur Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." * * *

Thus, as the Court pointed out in *DeShaney*, 489 U.S., 202, "the Due Process Clause of the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation." Yet, and as evident in petitioner's repeated reference to principles of tort law, that is precisely the effect of the petitioner's argument in this case.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: December 13, 2006.

APPENDIX

APPENDIX A

STATE OF MICHIGAN
COURT OF APPEALS

No. 250616
LC No. 01-143011-NI

[Filed April 7, 2005]

DOROTHY JONES, as Personal Representative of the Estate of DENISE MICHELLE JONES, Deceased,
Plaintiff-Appellant,

v

AARON REYNOLDS, MUSTAPHA ATAT, a/k/a CRAZY MOE MUSTAPHA, a/k/a MOE ATAT, and MARSHA DESIREE HUMPHREY,
Defendants,

and

CITY OF LINCOLN PARK, WILLIAM KISH III, JOSEPH LAVIS, DOUGLAS MUNCEY, and MOHAMED NASSER.
Defendants-Appellees.

Before: Talbot, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Plaintiff, Dorothy Jones, personal representative of the estate of Denise Michelle Jones (hereinafter "decedent"), appeals as of right from a default judgment entered against Aaron Reynolds, Mustapha Atat, and Marsha Desiree Humphrey for $25 million.[1] The default judgment was the final order for the proceeding, and plaintiff's appeal is based on the following orders involving defendants Lincoln Park and Lincoln Park Police Officers William Kish III, Joseph Lavis, Douglas Muncey, and Nasser Mohamed[2]; (1) an order only allowing plaintiff to amend its complaint with state claims, denying plaintiff's motion to compel documents, and setting aside a default entered against defendants; (2) an order granting defendants' motion for summary disposition and denying plaintiff's motion for summary disposition; and (3) an order granting Lincoln Park's motion for summary disposition as to plaintiff's original complaint.

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[1] Reynolds and Atat were the drivers of the vehicles involved in the race leading to decedent's death, and Humphrey owned the vehicle driven by Reynolds. On April 28, 2003, Reynolds plead guilty to charges of involuntary manslaughter, failure to stop at the scene of an accident resulting in death or injury, two counts of felonious driving, and one count of drag racing in Wayne County Circuit Court.

[2] Throughout this opinion Lincoln Park, Kish, Lavis, Muncey, and Nasser will collectively be referred to as defendants, singularly Lincoln Park will be referred to by name, and Kish, Lavis, Muncey, and Mohamed will collectively be referred to as "defendant police officers" and individually by name.

I

At approximately 1:45 a.m. on October 8, 2001, defendant police officers drove to the intersection of Fort Street and Outer Drive, and parked at the Lincoln Park Palace Party Store. Reynolds and Atat had met to drag race and wagers had been made. From the Lincoln Park Palace Party Store defendant police officers observed a large group of people who had gathered across Outer Drive in Detroit. Plaintiff alleges that defendant police officers played rap music over their patrol car's public address system to encourage a drag race, indicated that they would not arrest anyone, and gave the "go ahead" for the race. Reynolds and Atat started northbound on Fort Street. The car driven by Reynolds veered and fatally struck decedent, severing her leg, and injured two other bystanders.

Plaintiff filed a complaint against Reynolds, Humphrey, Atat, and defendants. The circuit court entered some orders staying the proceedings due to the criminal proceedings against defendant police officers.[3] On March 28, 2003, after a hearing, the circuit court granted summary disposition in favor of Lincoln Park, finding that defendant police officers were not the proximate cause of decedent's injuries, as proximate cause is defined in *Robinson v City of Detroit*, 463 Mich 439, 613 NW2d 307 (2000). But the circuit court granted plaintiff's motion to file an amended complaint.

Plaintiff filed its first amended complaint alleging in part: (1) that defendants should be liable for conspiracy to violate

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[3] On March 3, 2003, Officers, Nasser, Muncey, and Lavis entered a plea of no contest to neglect of duty, and all charges were dismissed against Kish.

MCL 257.626a (the drag racing statute); (2) that defendant police officers should be liable under MCL 691.1407(2)(C); (3) defendants were liable for common law gross negligence based on the wanton and willful conduct of defendant police officers; (4) Lincoln Park was liable under MCL 691.1405; (5) defendants were liable for federal constitutional violations under 42 USC 1983; and (6) defendants were liable for nuisance per se. At a hearing, the circuit court informed plaintiff there could not be any federal claims in the amended complaint because of time issues, thus, restricting the amended complaint. Subsequently, the trial court ordered that: (1) plaintiff be permitted to file an amended complaint alleging state law claims against defendants; (2) plaintiff's federal claims be stricken and withheld from filing until the state claims are heard; (3) the defaults entered against defendants be set aside; and (4) plaintiff's motion to compel Lincoln Park to produce documents and things is denied. Plaintiff filed an amended complaint per the circuit court order to only include state law claims, which changed the last complaint only by removing the federal claims. Another hearing was conducted on a motion for summary disposition filed by defendants' and plaintiff. The circuit court did not think that nuisance per se was one of the exceptions to governmental immunity and again noted that defendant police officers were not the proximate cause of decedent's injuries, thus, granted defendants' motion for summary disposition and denied plaintiff's motion for summary disposition.

II

Plaintiff argues, on appeal, that governmental immunity under MCL 691.1407(2)(c), as interpreted by *Robinson*, *supra*, illegally provides immunity to government employees giving them a vehicle to conspire to immunize themselves. We disagree.

Plaintiff failed to present this issue to the trial court. Generally, constitutional challenges to a statute may not be raised for the first time on appeal. *Brookdale Cemetery Ass'n v Lewis*, 342 Mich 14, 18; 69 NW2d 176 (1955); *Lumber Village, Inc v Siegler*, 135 Mich App 685, 692; 355 NW2d 654 (1984). In addition, plaintiff has not properly presented the issue on appeal. It is difficult to ascertain what plaintiff's exact argument is with regard to this issue. Seemingly, plaintiff is challenging the constitutionality of the Michigan Supreme Court's interpretation of the governmental immunity statute in *Robinson*, *supra*, because it does not account for conspiracy like 42 USC 1985.[4] Plaintiff provides no support for why Michigan's governmental immunity statute must take conspiracy into account. To properly present an appeal, an appellant must appropriately argue the merits of the issues she identifies in her statement of the questions involved. *Richmond Twp v Erbes*, 192 Mich App 210, 220; 489 NW2d 504 (1992), overruled in part on other grounds in *Bechtold v Morris*, 443 Mich 105; 503 NW2d 654 (1993). The appellant may not merely announce her position and leave it to this Court to discover and rationalize the basis for her claims, *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Ambs v Kalamazoo County Road Comm*, 255 Mich App 637, 650; 662 NW2d 424 (2003), nor may she give issues cursory

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[4] "In order to establish a claim under 42 USC 1985(3) plaintiffs must prove: (1) the existence of a conspiracy, (2) intent to deny plaintiffs the equal protection of the laws or of equal privileges and immunities under the laws, (3) injury or deprivation of a federally protected right of plaintiffs, (4) an overt act in furtherance of the object of the conspiracy, and (5) some racial or other class-based invidiously discriminatory animus behind the conspirators' actions." *Mitchell v Cole*, 176 Mich App 200; 439 NW2d 319 (1989) citing *Griffin v Breckenridge*, 403 US 88, 102-103; 91 S Ct 1790; 29 L Ed 2d 338 (1971).

treatment with little or no citations of supporting authority, *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984), *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001). Argument must be supported by citation to appropriate authority or policy. MCR 7.212(C)(7), *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). An appellant's failure to properly address the merits of her assertion of error constitutes abandonment of the issue. *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Thus, plaintiff has abandoned this issue on appeal.

Nonetheless, this argument is without merit. This Court and the Michigan Supreme Court have found that MCL 691.1407 is not unconstitutional on numerous occasions, *McCann v State of Michigan*, 398 Mich 65, 77, 80; 247 NW2d 521 (1976), Ryan, J., concurring; *Pittman v City of Taylor*, 398 Mich 41; 247 NW2d 512 (1976); *Allen v Dep't of Mental Health*, 79 Mich App 170; 261 NW2d 247 (1977); *Wojtasinski v Saginaw*, 74 Mich App 476, 254 NW2d 71 (1977). Michigan's governmental immunity statute is not in conflict with 42 USC 1985, and Michigan's governmental immunity statutes does not prevent plaintiff from bringing a federal 42 USC 1985 claim, instead, only limits plaintiff's ability to bring state tort claims. See *Borg-Warner Acceptance Corp v Dep't of State*, 433 Mich 16, 19; 444 NW2d 786 (1989); *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 647-648; 363 NW2d 641 (1984). Plaintiff may bring suit against a municipality pursuant to 42 USC 1985, thus, plaintiff's contention is without merit. See *Jones v Powell*, 462 Mich 329, 336-337; 612 NW2d 423 (2000).

Plaintiff's remaining contentions seem to be based on policy. Where the language of a statute is clear, it is not the

role of the judiciary to second-guess a legislative policy choice; a court's constitutional obligation is to interpret, not rewrite, the law. See *Hanson v Bd of Co Rd Comm'rs of Mecosta Co*, 465 Mich 492, 504; 638 NW2d 396 (2002). A court's function in interpreting a statute is not "to independently assess what would be most fair or just or best public policy," but "to discern the intent of the Legislature from the language of the statute it enacts." *Id.* The Supreme Court has clarified how MCL 691.1407 is to be applied in *Robinson*, *supra*, and this Court is bound to follow our Supreme Court's decisions. *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993); *Lopez v General Motors Corp*, 224 Mich App 618, 630; 569 NW2d 861 (1997). For the above reasons, plaintiff has not properly presented this argument on appeal and the argument is without merit.

III

Plaintiff's next issue on appeal is that the trial court erred in granting defendants' motions for summary disposition pursuant to governmental immunity and denying plaintiff's motion for summary disposition where defendant police officers were grossly negligent and the proximate cause of decedent's injuries. We disagree.

A. Standard of Review

This Court reviews decisions on motions for summary disposition de novo. *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 685; 684 NW2d 711 (2004). Apparently, the circuit court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(7), which permits summary disposition where a claim is barred by governmental immunity. In evaluating whether summary

disposition should have been granted under MCR 2.116(C)(7), this Court "considers all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001); MCR 2.116(G)(5). Summary disposition should not be granted unless no factual development could provide a basis for recovery. *Simmons v Apex Drug Stores*, 201 Mich App 250, 252; 506 NW2d 562 (1993).

Plaintiff's cross motion requested summary disposition pursuant to MCR 2.116(C)(9) and (10). MCR 2.116(C)(9) provides that a motion for summary disposition may be raised on the ground that the opposing party has failed to state a valid defense to the claim asserted against him. The motion tests the sufficiency of a defendant's pleadings alone, and all well-pled allegations are accepted as true. *Allstate Ins Co v Morton*, 254 Mich App 418, 421; 657 NW2d 181 (2002). Summary disposition is proper if the defenses are so clearly untenable as a matter of law that no factual development could possibly deny a plaintiff's right to recovery. *Id.* at 421. Under MCR 2.116(C)(10), a party may move for dismissal of a claim based on the assertion that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. The motion tests the factual support for a claim, and when reviewing the motion, the court must consider all of the documentary evidence in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

B. Proximate Cause

The circuit court granted defendants' motions for summary disposition and denied plaintiff's motion for summary disposition finding that defendants were immune under MCL 691.1407 because defendant police officers' conduct was not the proximate cause of decedent's injuries. We find that summary disposition was properly entered in favor of defendants based on governmental immunity under MCL 691.1407(2) because defendant police officers were not "the" proximate cause of decedent's injuries. Because defendants stated a valid defense and plaintiff is not entitled to judgment as a matter of law, plaintiff's motion for summary disposition was properly denied pursuant to MCR 2.116(C)(9) and (10).

MCL 691.1407(2) provides:

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency . . . is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service . . . if all of the following are met:
>
> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.

> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

Whether a governmental employee was acting within the course of his employment depends on the existence of an employment relationship and the circumstances of the work environment created by the relationship, including the temporal and spatial boundaries established. *Backus v Kauffman (On Rehearing)*, 238 Mich App 402, 407-409; 605 NW2d 690 (1999). And, whether the employee was acting within the scope of his authority depends on the reasonable power delegated to him to accomplish the business of his employer under the circumstances. *Id.*

There appears to be no dispute that defendant police officers were within the course of their employment and within the scope of their authority. The dispute is whether defendant police officers were the proximate cause of decedent's injuries. The circuit court granted summary disposition finding that defendant police officers were not the proximate cause of decedent's injuries and death. Plaintiff argues that the gross negligence of defendant police officers was the proximate cause of decedent's injuries because it was part of a chain that was not broken.

Governmental employees are immune from liability for injuries they cause during the course of their employment if they are acting within the scope of their authority, if they are engaged in the discharge of a governmental function, and if their "conduct does not amount to gross negligence that is the

proximate cause of the injury or damage." *Robinson*, *supra*, at 462. To be the proximate cause of an injury, gross negligence of a government employee that subjects him to liability must be "the one must immediate, efficient and direct cause" preceding the injury. *Id.*; *Tarlea v Crabtree*, 263 Mich App 80, 92; 687 NW2d 333 (2004) (finding that the defendants' conduct was not the proximate cause of the plaintiff's death due in part to heat stroke where the plaintiff had the option to not participate in a football-camp run or to stop and rest during the run). In *Robinson*, *supra* at 462, our Supreme Court provided:

> [R]ecognizing that "the" is a definite article, and "cause" is a singular noun, it is clear that the phrase "the proximate cause" contemplates *one* cause. Yet, meaning must also be given to the adjective "proximate" when juxtaposed between "the" and "cause" as it is here. We are helped by the fact that this Court long ago defined "the proximate cause" as "the immediate efficient, direct cause preceding the injury." *Stoll v Laubengayer*, 174 Mich 701, 706; 104 NW 532 (1913). The Legislature has nowhere abrogated this, and thus we conclude that in MCL 691.1407(2)(c); MSA 3.996(107)(2)(c) the Legislature provided tort immunity for employees of governmental agencies unless the employee's conduct amounts to gross negligence that is the one most immediate, efficient, and direct cause of the injury or damage, i.e., the proximate cause.

Reynolds and Atat were racing vehicles and accelerating at a high speed when the vehicle driven by Reynolds veered off into a crowd of onlookers and hit decedent, severing her leg, causing her to bleed to death. In a light most favorable to plaintiff, defendant police officers sanctioned and condoned

the race and played rap music over the public address system of their police vehicles to encourage a competitive atmosphere. Plaintiff argues that defendant police officers' overt actions were the proximate cause because the race would not have occurred but for defendant police officers' overt actions, which were all a part of one chain of events.

Applying the *Robinson* standard, in this case, the impact of the vehicle driven by Reynolds with decedent's body was "the one most immediate, efficient and direct cause" of decedent's injuries and death. See *Curtis v Flint*, 253 Mich App 555, 563; 655 NW2d 791 (2002). Clearly, the one most immediate, efficient, and direct cause of decedent's death was Reynolds' vehicle striking decedent. Defendant police officers' conduct, assuming gross negligence, while a cause of decedent's death, it was but one cause, and was therefore, not "the one most immediate, efficient, and direct cause" as required by *Robinson*. *Id*. The second most direct cause would be decedent gathering at the particular location. Even if plaintiff had established the necessary level of negligence, the claims against defendant police officers were factually insufficient to overcome immunity because defendant police officers were not the proximate cause of decedent's injuries or death. See *Curtis*, *supra* at 563. As such, Lincoln Park is not vicariously liable.

For the above reasons, the circuit court did not err in granting defendants' motion for summary disposition based on the fact that defendants were not "the" proximate cause of decedent's death, and denying plaintiff's motion for summary disposition when defendants stated valid defenses and plaintiff was not entitled to judgment as a matter of law. Because the alleged actions and inactions of defendant police officers were not "the" proximate cause of decedent's injuries or death, it

is unnecessary to address whether defendant police officers were grossly negligent. See *Robinson*, *supra*.

C. Willful and Wanton Misconduct

Plaintiff also argues that she has alleged willful and wanton misconduct in addition to gross negligence, and that in order to establish a claim only needs to show that defendant police officers were "a" proximate cause. However, plaintiff has provided no relevant support for this argument and we have found no support for the argument.

Plaintiff does not raise the willful or wanton issue in the statement of questions presented. The appellant must identify her issues in her brief in the statement of questions presented. MCR 7.212(C)(5), *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999). Ordinarily, no point will be considered which is not set forth in the statement of questions presented. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). Further, plaintiff has not presented any support for the contention that willful and wanton conduct is an exception from governmental immunity that only requires a showing of "a" proximate cause. Plaintiff cites *Gibbard v Cursan*, 225 Mich 311; 196 NW 328 (1923) (nongovernmental negligence case describing instructions for contributory negligence) and *Burnett v Adrian*, 414 Mich 448; 326 NW2d 810 (1982) (regarding a recreational use law that authorized recovery for gross negligence or will and wanton conduct), neither applying willful misconduct as an exception to governmental immunity. To properly present an appeal, an appellant must appropriately argue the merits of the issues she identifies in her statement of the questions involved. *Richmond Twp*, *supra* at 220. The appellant may not merely announce her position and leave it to this Court to discover

and rationalize the basis for her claims, *Wilson*, *supra* at 243; *Ambs*, *supra* at 650, nor may she give issues cursory treatment with little or no citation of supporting authority, *Goolsby*, *supra* at 655 n 1; *Silver Creek Twp*, *supra* at 99. Argument must be supported by citation to appropriate authority or policy. MCR 7.212(C)(7), *Peterson Novelties, Inc*, *supra* at 14. An appellant's failure to properly address the merits of her assertion of error constitutes abandonment of the issue. *Yee*, *supra* at 406.

Regardless, we have found no authority supporting plaintiff's contention that when willful and wanton conduct is involved defendants only need to be "a" proximate cause. We have found no such exception to governmental immunity. To the contrary, in *Young v Robin*, 122 Mich App 84, 87; 329 NW2d 430 (1982), this Court held that "We need not address the defendants' contention that the trial court erred in finding that there existed a genuine issue of fact as to whether the state troopers were guilty of willful and wanton misconduct, since conduct falling short of an intentionally wrongful act is not an exception to governmental immunity." Thus, this claim was not even a valid exception to governmental immunity prior to the July 1986 amendments to MCL 691.1407. See *Sudul v Hamtramck*, 221 Mich App 455, 458 (Corrigan, J.), 480-481 (Murphy, J.); 562 NW2d 478 (1997).

We find that plaintiff has abandoned her argument with regard to willful and wanton conduct, and the argument is without merit.

D. Nuisance Per Se

Plaintiff contends that her motion for summary disposition should have been granted and Lincoln Park's denied based on nuisance per se. The circuit court found that Lincoln Park

was immune from a nuisance per se claim. We find that plaintiff has failed to present a question of fact constituting a nuisance per se because a car racing is not a nuisance at all times, without regard to the care with which it is conducted.

Generally, governmental agencies are granted statutory immunity from tort liability unless otherwise provided in the act. MCL 691.1401 et seq; see also *Haaksma v Grand Rapids*, 247 Mich App 44, 52; 634 NW2d 390 (2001). However, it is not clear whether nuisance per se is firmly recognized as an exception to governmental immunity. See *(Li v Feldt After Second Remand)*, 439 Mich 457, 477; 487 NW2d 127 (1992), overruled on other grounds by *Pohutski v Allen Park*, 465 Mich 675; 641 NW2d 219 (2002) (where the Supreme Court commented that "regardless of whether nuisance per se might qualify as an exception to governmental immunity," the plaintiffs in the cases before it did not present nuisance per se claims); *McDowell v Detroit*, 264 Mich App 337, 346-347; 690 NW2d (2004). Nonetheless, even if nuisance per se is a recognized exception plaintiff has, nevertheless, failed to establish facts amounting to a nuisance per se.

This Court in *McDowell*, *supra*, recently provided the following with regard to nuisance per se:

> "[A] nuisance per se is an activity or condition which constitutes a nuisance at all times and under all circumstances, without regard to the care with which it is conducted or maintained." *Li v Feldt (After Second Remand)*, 439 Mich 457, 476-477; 487 NW2d 127 (1992)(opinion by Cavanagh, C.J.). In order to meet the definition of a nuisance per se, the condition must be unreasonable by its very nature and must not be predicated on a lack of case. *Id.* at 477. Pursuant

> to this definition, our Supreme Court has stated that neither an improperly timed traffic light nor the maintenance of a holding pond could be considered "an intrinsically unreasonably or dangerous activity, without regard for care or circumstances . . . [because] both activities serve obvious and beneficial public purposes and are clearly capable of being conducted in such a way as not to pose any nuisance at all." *Id.*

A nuisance per se is not predicated on the want of care, but is unreasonable by its very nature. *Li*, *supra* at 477.

In the present case, a drag race was at issue. Plaintiff relies upon the following deposition testimony of Lincoln Park Police Chief Kish:

> *Q*. If the facts show in this case that there were two Mustangs that were designed for drag racing, propelled by nitrous oxide, on a public street, would you consider that to be a dangerous activity at all times, under any circumstances?
>
> *A*. Yes.
>
> *Q*. Similarly, using those types of vehicles on a public street that I've described, would you consider that to be an inherently dangerous activity?
>
> *A*. Yes.
>
> * * *
>
> *Q*. Would you agree that drag racing two Mustangs modified to consume nitrous oxide, as the

> evidence will show in this case, on a public street, is an intrinsically unreasonably dangerous activity without regard for care or circumstances?
>
> *A.* Yes.

* * *

Plaintiff contends that Lincoln Park, based on the testimony of Chief Kish, acknowledges that drag racing is a nuisance per se.

We find that a nuisance per se does not exist in this case. Plaintiff contends that a nuisance per se exists because "conducting a race on October 7, 2001, at approximately 1:30 A.M., in the morning, when most people are presumably asleep, this 'drag race' activity being conducted on a public [s]treet, in a residential neighborhood," and then listed other factors specific to the race. Certainly, driving and racing can be conducted in a manner that is safe. Under the present circumstances the race was not conducted in a safe manner, but races are conducted professionally all of the time and are maintained and conducted in a manner that is not a nuisance under all circumstances. This Court is to review the activity to determine if it is a nuisance at all times no matter the care or how it is maintained. A race certainly can be envisioned which is not a nuisance and can be conducted and maintained in a manner that does not cause a nuisance. Plaintiff's claim is predicated on lack of care. And, racing is not an intrinsically unreasonable or dangerous activity. The questioning of Chief Kish in the deposition presents a question based on a specific situation in which proper care may not have been taken. In addition, Chief Kish would not be able to make legal conclusions as to what a nuisance per se is. Racing is not "an intrinsically unreasonable or dangerous

activity." *Li, supra* at 477 (opinion by Cavanagh, C.J.). Obviously with proper care and concern, racing can be conducted in a manner that does not pose a nuisance at all times and under all circumstances.

For the above reasons, plaintiff has failed to present a question of fact constituting a nuisance per se because a car racing is not a nuisance at all times, without regard to the care with which it is conducted, thus, the circuit court properly granted Lincoln Park's motion for summary disposition[5] and denied plaintiff's motion for summary disposition.

E. Motor Vehicle Exception to Governmental Immunity

Plaintiff's next argues that the trial court erred in granting Lincoln Park's motion for summary disposition pursuant to MCL 691.1405 and denying plaintiff's motion for summary disposition where Lincoln Park was not entitled to governmental immunity because of the motor vehicle exception to governmental immunity. We disagree. The determination whether a vehicle is a motor vehicle within the scope of the exception to governmental immunity is an issue of statutory construction subject to de novo consideration on appeal. *Stanton v Battle Creek*, 466 Mich 611, 614-615; 647 NW2d 508 (2002).

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[5] Even if the circuit court improperly decided the motion based on governmental immunity (as it indicated that governmental immunity did not provide an exception for nuisance per se, which is not clear), "[a] trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason." *Gleason v Michigan Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

The trial court properly granted Lincoln Park's motion for summary disposition and denied plaintiff's motion for summary disposition because the Lincoln Park police vehicles were not being operated within the meaning of MCL 691.1405; i.e., decedent's injuries and death were not directly associated with the operation of the Lincoln Park police vehicles.

The motor vehicle exception of the governmental immunity act, MCL 691.1405, provides:

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner, as defined in Act No. 300 of the Public Acts of 1949, as amended, being sections 257.1 to 257.923 of the Compiled Laws of 1948.

Plaintiff contends that Lincoln Park's answer to her requests for admissions establishes that defendant police officers' vehicles were operated in a manner excepting Lincoln Park from governmental immunity. Lincoln Park in its answers to plaintiff's requests for admissions, admitted that defendant police officers operated and occupied Lincoln Park vehicles during the drag race, these vehicles were parked at a Lincoln Park party store near the drag race, and that defendant officers were within the scope of their employment during the drag race. Plaintiff argues that Lincoln Park police cars hyped the crowd and that, although the lights were off, the engines were running. Plaintiff also argues that the police vehicles were being operated in violation of the drag racing statute MCL 257.626a because the vehicles were rendering assistance to the race. Plaintiff relying on *Nolan v Bronson*,

185 Mich App 162; 460 NW2d 284 (1990), argues that the vehicle does not have to be moving and can support application of governmental immunity under the current facts because all that is necessary is that the vehicle is "'being used or employed in some function or to produce some desired work or effect.'" *Nolan*, *supra* at 177.

Recently, in addressing nearly the exact same argument in *Poppen v Tovey*, 256 Mich App 351, 355-356; 664 NW2d 269 (2003), this Court provided:

> Citing *Wells v Dep't of Corrections*, 79 Mich App 166; 261 NW2d 245 (1977) and *Nolan v Bronson*, 185 Mich App 163; 460 NW2d 284 (1990), plaintiff argues that for purposes of the motor-vehicle exception it is not necessary that a vehicle be in motion at the time of the injury to find that the injury resulted from "operation" of a motor vehicle. Rather, all that is necessary is that the vehicle is "'being used or employed in some specific function or to produce some desired work or effect.'" *Nolan*, 185 Mich App at 177, quoting *Wells*, 79 Mich App at 169. Our Supreme Court, however, recently rejected this expansive definition of "operation" in *Chandler v Muskegon Co*, 467 Mich 315; 652 NW2d 224 (2002), determining that such a construction defines the term "so broadly that it could apply to virtually any situation imaginable in which a motor vehicle is involved regardless of the nature of its involvement." *Id.* at 321. Noting the well-established principle that the statutory exceptions to governmental immunity must be narrowly construed, the Court concluded that the phrase "'operation of a motor vehicle' means that the motor vehicle is being operated as a motor vehicle" and, therefore, encompasses only those

> "activities that are directly associated with the driving of a motor vehicle." *Id.* at 320-321 (emphasis in original). Applying this definition to the undisputed facts of this case, we find no error in the trial court's conclusion that plaintiff's injuries did not result from "operation" of a government-owned motor vehicle. At the time of the collision, the city vehicle had been stopped for approximately three to five minutes in order to permit its passenger to inspect a public utility. Once stopped for this purpose, its presence on the road was no longer "directly associated with the driving of that vehicle. *Id.* at 321. Accordingly, the vehicle was not being operated "as" a motor vehicle at the time of the accident and summary disposition in favor of the city was appropriate.

Thus, the mere involvement of a motor vehicle is not sufficient to abrogate immunity. Rather, the negligent operation of a vehicle requires that the motor vehicle was being operated as a motor vehicle, and the exception encompasses only activities which are directly associated with the driving of a motor vehicle. See *Chandler*, *supra* at 320-32; *Poppen*, *supra* at 355. To result from the negligent operation of a motor vehicle, generally an injury must result from physical contact between the governmental-owed vehicle and the plaintiff's vehicle, or from circumstances in which the government-owned vehicle physically forced the plaintiff's vehicle off the road or into another object. See *Robinson*, *supra* at 457; *Curtis*, *supra* at 559.

Clearly, the Lincoln Park vehicles were not being operated "as a motor vehicle," as statutorily defined and interpreted by this Court and the Supreme Court. It is undisputed the vehicles were not moving, and, at most, were being used through their public address systems. There was

no physical contact between decedent and the Lincoln Park police vehicles; nor was any activity of the Lincoln Park police vehicles directly associates with the driving of a motor vehicle. The circuit court properly granted Lincoln Park's motion for summary disposition in this regard and properly denied plaintiff's motion for summary disposition because decedent's injuries did not result from the negligent operation of Lincoln Park police vehicles.

IV

Plaintiff next contends, on appeal, that the trial court abused its discretion by setting aside the entry of default against defendants. We disagree.

A. Standard of Review

The application and construction of court rules is an issue of law subject to de novo review. *Barclay v Crown Bldg & Development, Inc*, 241 Mich App 639, 642; 617 NW2d 373 (2000). Whether a default or a default judgment should be set aside is within the sound discretion of the trial court, and this Court reviews a trial court's decision to set aside a default or default judgment for a clear abuse of discretion. *Amoco Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 97; 666 NW2d 623 (2003). "An abuse of discretion involves far more than a difference in judicial opinion." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). A trial court abuses its discretion when "the result is 'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias.'" *Id.*, quoting *Marrs v Bd of Medicine*, 422 Mich 688, 694; 375 NW2d 321 (1985). Where there has

been a valid exercise of discretion, appellate review is sharply limited. *Id.*

B. Setting Aside a Default

Plaintiff contends that defendants never filed answers to plaintiff's amended complaint filed on March 31, 2003 or at least did not answer within the proper time period established by the fact that the default needed to be set aside. Plaintiff further contends that the trial court abused its discretion in setting aside the default. We find that the circuit court did not clearly abuse its discretion in setting aside the default entered against defendants.

A motion to set aside a default or a default judgment generally may be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. MCR 2.603(D)(1); *Alken-Ziegler, supra* at 223. Whether a party has made a sufficient showing of good cause and of a meritorious defense are discrete inquiries, but the strength of a proffered meritorious defense can affect the necessary showing of good cause. *Alken-Ziegler, supra* at 232-233. Good cause sufficient to warrant setting aside a default or a default judgment may be shown by: (1) a substantial irregularity or defect was present in the proceeding on which the default is based; or (2) there was a reasonable excuse for failure to comply with the requirements that created the default. *Id.* at 233; see also *Amoco Builders & Developers, Inc, supra.* A substantial defect or irregularity must have prejudiced the defendant to constitute good cause. *Alycekay Co v Hasko Construction Co*, 180 Mich App 502, 506-507; 448 NW2d 43 (1989); *Emmons v Emmons*, 136 Mich App 157, 164-165; 355 NW2d 898 (1984). The policy of this state generally favors the meritorious determination of issues, but once regularly entered, default judgments should stand after

expiration of the time provided. *Amco Builders & Developers, Inc, supra* at 95; *Alken-Ziegler, supra* at 227; *Koski v Allstate Ins Co*, 456 Mich 439, 447; 572 NW2d 636 (1998); *Wendel v Swanberg*, 384 Mich 468, 476; 185 NW2d 348 (1971).

1. Defendant Police Officers

Plaintiff filed an amended complaint on March 31, 2003. On April 17, 2003, defendant police officers filed a motion to set aside the order granting leave to amend complaint and to strike the amended complaint. MCR 2.603 provides for entry of a default "[if] a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules." Plaintiff entered the default based on defendants' failure to comply with MCR 2.108. MCR 2.108(A)(1) provides: "A defendant must serve and file an answer or take other action permitted by law or these rules within 21 days after being served with the summons and a copy of the complaint in Michigan in the manner provided in MCR 2.108(A)(1)." MCR 2.108(B) provides: "A motion raising a defense or an objection to a pleading must be served and filed within the time for filing the responsive pleading or, if no responsive pleading is required, within 21 days after service of the pleading to which the motion is directed." MCR 2.108(C)(3) provides: "The response to a supplemental pleading or to a pleading amended either as of right or by leave of court must be served and filed within the time remaining for response to the original pleading or within 21 days after service of the supplemental or amended pleading, whichever period is longer."

Defendant police officers filed the motion to strike the amended complaint and motion to set aside the amended complaint within the proper time period pursuant to MCR

2.108(B), and this is consistent with the "otherwise defend" language of MCR 2.603, thus, entry of the default was improper. In *Alken-Ziegler*, *supra* at 229, our Supreme Court noted:

> . . . although the law favors the determination of claims on the merits, . . . it also has been said that the policy of this state is generally against setting aside defaults and default judgments that have been *properly entered*. [Citations omitted and emphasis added.]

Thus, the policy is not against setting aside defaults that have not been properly entered. Defendant police officers did *otherwise defend*, thus, entry of the default was improper. Nonetheless, even if the default was properly entered, the circuit court did not clearly abuse its discretion in setting aside the default against defendant police officers.

Defendant police officers' motion and objection to the amended pleading and the record support that there were substantial procedural irregularities, thus, defendant police officers have shown "good cause." On March 14, 2003, plaintiff brought a motion for leave to file an amended complaint and attached the amended complaint. Subsequently, on March 27, 2003, defendant police officers filed a motion for summary disposition contending that summary disposition was proper on plaintiff's original complaint and the proposed first amended complaint attached to the March 14, 2003, motion to amend. On March 28, 2003, there was a hearing on Lincoln Park's motion for summary disposition and the circuit court indicated that plaintiff could file the amended complaint. Then, on March 31, 2003, plaintiff filed the first amended complaint, which differed from the amended complaint presented at the hearing. The amended complaint also contained claims that the circuit

court had already granted summary disposition on and federal claims which were later stricken. Further, defendant police officers provided plaintiff with a meritorious defense before the first amended complaint filed, which also supported a complete defense for defendant police officers for the claims in the amended complaint (noting that the federal claims were stricken from her first amended complaint). Moreover, defendant acknowledged at the April 25, 2003 hearing that there were no new state claims against defendant police officers in the amended complaint, and the federal claims were stricken. Thus, defendants' response to plaintiff's original complaint addressed all of the claims against defendant police officers that were valid. It is clear defendant police officers' prior response adequately provided a meritorious defense to the amended complaint raising no new proper claims against defendant police officers.[6]

Even, if defendant police officers were somewhat negligent, "[t]he mere existence of negligence does not preclude a finding of good cause." *Huggins v Bohman*, 228 Mich App 84, 88, 578 NW2d 326 (1998). Indeed, the first of

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[6] A specific affidavit of meritorious defense is not required when it is clear from the record that defendants had presented a meritorious defense. See *ISB Sales Co*, *supra* at 533-544; *Jones v Philip Atkins Construction Co*, 143 Mich App 150, 161; 371 NW2d 508 (1985); see also *Hertz Schram & Saretsky v Turner*, unpublished per curiam opinion of the Michigan Court of Appeals (Docket No. 239176, issued January 20, 2004); *Francis v Yelle*, unpublished per curiam opinion of the Michigan Court of Appeals (Docket No. 237406, issued May 29, 2003). We note these unpublished opinion as persuasive, because of the limited case law, but notes that unpublished opinions are not binding under the rules of stare decisis. MCR 7.215(C)(1); see also *Dyball v Lennox*, 260 Mich App 698. 705 n 1; 680 NW2d 522 (2003).

the five specific grounds for providing relief from a judgment is "mistake, inadvertence, surprise, or excusable neglect . . . ." MCR 2.612(C)(1)(a). Defaults and default judgments may also be set aside under the standards of MCR 2.612, pertaining to relief from judgment. MCR 2.603(D)(3); *Alken-Ziegle*, *supra* at 234 n 7. As noted, "[a] showing of a meritorious defense and factual issues for trial can fulfill the 'good cause' requirement because in some situations, allowing such a default to stand would result in manifest injustice." *Huggins*, *supra* at 88, citing *Park v American Casualty Ins Co*, 219 Mich App 62, 67; 555 NW2d 720 (1996). Finally, relief from judgment rule authorizes relief for "any other reason justifying relief from the operation of judgment." MCR 2.612(C)(1)(f). This catchall provision grants a trial court wide discretion to set aside a default if it determines that manifest injustice might flow from the entry of a default judgment.

For the above reasons, we find that the trial court did not commit a clear abuse of discretion in setting aside the default entered against defendant police officers.

2. Lincoln Park

Although, a closer question, the circuit court did not clearly abuse its discretion in setting aside the default entered against Lincoln Park.

At a March 28, 2003 hearing the circuit court indicated that it was granting Lincoln Park's motion for summary disposition because of governmental immunity. And, the circuit court at this same hearing indicated that plaintiff could amend the complaint. At this hearing, Lincoln Park addressed plaintiff's submitted amended complaint and contended that it did not matter because it was still entitled to

governmental immunity pursuant to *Robinson*, *supra*. There were three versions of the amended complaint presented prior to entry of the default judgment: (1) March 14, 2003, plaintiff presented one version with her motion for leave to amend; (2) on March 28, 2003, at the hearing plaintiff presented another version of the amended complaint and was granted leave to amend; and (3) on March 31, 2003, plaintiff filed yet another version of the amended complaint, which subsequently had claims stricken from it. The amended complaint, filed on March 31, 2003, which Lincoln Park did not respond to, was later found to be improper. On April 25, 2002, a hearing was conducted and it appears that both Lincoln Park and the circuit court were confused as to whether Lincoln Park was still a party to the proceedings, since the circuit court had earlier granted its motion for summary disposition. The new complaint contained the former allegations that the circuit court had already granted summary disposition on and new claims for nuisance per se and federal claims. There were questions throughout the hearing regarding the filing of the complaint. The circuit court ordered that the federal law claims contained in the amended complaint were to be stricken and for plaintiff to file another amended complaint without the federal claims.

The was a substantial number of irregularities and defects in the proceedings below regarding plaintiff's amended complaint; thus, there was "good cause" to set aside the default against Lincoln Park. *Alken-Ziegler*, *supra* at 233; *Barclay*, *supra* at 653. Lincoln Park presented a defense based on governmental immunity in its original pleadings, which carried over to the amended pleadings. These arguments also covered plaintiff's addition of the nuisance per se claim, in which, the complaint itself was lacking because racing is not a nuisance per se. And, Lincoln Park presented a meritorious defense at the hearing where plaintiff argued her

motion to amend when it argued that it was still entitled to governmental immunity on the claims presented in the amended complaint.[7]

Even if Lincoln Park was somewhat negligent, "[t]he mere existence of negligence does not preclude a finding of good cause." *Huggins*, *supra* at 88. Indeed, the first of the five specific grounds for providing relief from a judgment is "mistake, inadvertence, surprise, or excusable neglect . . . ." MCR 2.612(C)(1)(a). Defaults and default judgments may also be set aside under the standards of MCR 2.612, pertaining to relief from judgment. MCR 2.603(D)(3); *Alken-Ziegler*, *supra* at 234 n 7. As noted, "[a] showing of a meritorious defense and factual issues for trial can fulfill the 'good cause' requirement because in some situations, allowing such a default to stand would result in manifest injustice." *Huggins*, *supra* at 88, citing *Park*, *supra* at 67. Finally, the relief from judgment rule authorizes relief for "any other reason justifying relief from the operation of judgment." MCR 2.612(C)(1)(f). This catchall provision grants a trial court wide discretion to set aside a default if it determines that manifest injustice might flow from the entry of a default judgment. Manifest injustice would result if the default was not set aside as Lincoln Park, would be liable to plaintiff for claims for which it is immune.

For the above reasons, it was not a clear abuse of discretion for the circuit court to find that Lincoln Park

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[7] As noted above, a specific affidavit of meritorious defense is not required when it is clear from the record that defendants had presented a meritorious defense. See *ISB Sales Co*, *supra* at 533-544; *Jones*, *supra* at 161; see also *Hertz Schram & Saretsky*, *supra* *v Turner*; *Francis*, *supra*.

satisfied the good cause prong of the analysis, even if it was negligent in responding to the first amended complaint, as it thought it was dismissed from the case. This lesser showing of good cause is sufficient when, as seen in this case, a manifest injustice could result from the default judgment in light of the existence of a meritorious defense. The circuit court's decision to set aside the default was not palpably and grossly violative of fact and logic. See *Alken-Ziegler*, *supra* at 227.

V

Plaintiff next argues, on appeal, that the trial court abused its discretion in denying plaintiff's motion to compel production of relevant documents from Lincoln Park. We disagree.

A. Standard of Review

A motion to compel discovery is a matter within the trial court's discretion, and the court's decision to grant or deny a discovery motion will be reversed only if there has been abuse of that discretion. *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 343; 497 NW2d 585 (1993). In civil cases, an abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dep't of Transp v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000). Michigan law generally provides for the discovery of any relevant, nonprivileged matter. MCR 2.302(B)(1); *Eyde v Eyde*, 172 Mich App 49, 54-55; 431 NW2d 459 (1988).

B. Motion to Compel Production of Documents

Plaintiff contends that the circuit court abused its discretion in denying plaintiff's motion to compel production of documents against Lincoln Park, particularly, when the original request was submitted before Lincoln Park was dismissed from the case. It does not appear that the circuit court abused its discretion, but, regardless, any error was clearly harmless. Plaintiff's brief on appeal does not specifically address what documents it wanted, but indicated the production of documents were "relevant to find impeachment evidence." However, in granting summary disposition in favor of defendants the circuit court viewed all evidence in a light most favorable to plaintiff, thus, the admission of impeachment evidence would not have changed anything. Consequently, any error was harmless error and plaintiff's substantial rights were not affected. See *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004); *Campbell v Sullins*, 257 Mich App 179, 197; 667 NW2d 887 (2003); MCR 103(a); MCR 2.613(A). As such, even if the circuit court did abuse its discretion (which it does not seem that it did), plaintiff is entitled to no relief on this issue.

VI

Plaintiff's final issue on appeal is that the trial court abused its discretion in striking and withholding from filing the federal civil rights claims where the motion to file an amended complaint was stipulated to and granted by the circuit court. We disagree because the circuit court did not abuse its discretion in restricting plaintiff's first amended complaint to state claims.

A. Standard of Review

This Court reviews a trial court's decision on a motion to amend and a motion to strike for an abuse of discretion. *Frank W Lynch & Co v Flex Techs, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001), *Ostroth v Warren Regency, GP, LLC*, 263 Mich App 1, 5; 687 NW2d 309 (2004); *Phillips v Deihm*, 213 Mich App 389, 394; 541 NW2d 566 (1995).

B. Plaintiff's Federal Claims

Plaintiff contends that the circuit court abused its discretion in restricting her first amended complaint to state claims, thus, striking her 42 USC 1983 claims. Plaintiff sought leave to amend her complaint pursuant to MCR 2.118(A)(2), which provides that "except as provided in subrule (A)(1), a party may amend a pleading only by leave of court or by written consent of the adverse party. Leave shall be freely given when justice so requires." MCR 2.118(A)(2).

Particularized reasons for denying a motion to amend include: (1) undue delay; (2) the movant's bad faith or dilatory motive; (3) repeated failures to cure deficiencies by amendments previously allowed; (4) undue prejudice to the nonmoving party; and (5) futility. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239-240; 615 NW2d 241 (2000). Seemingly, the circuit court limited plaintiff's amended complaint to state claims because of time and undue prejudice to defendants' ability to remove the claim to federal court; there was also confusion that was caused by plaintiff presenting three different proposed first amended complaints. The record reflects that the circuit court noted these particularized reasons and seemed to weigh this against the fact that plaintiff would not be prejudiced. There was

confusion surrounding the claims in that the 42 USC 1983 claims were not specifically in the motion to amend plaintiff presented to the circuit court when requesting an amendment.

While it is true that leave to amend shall be freely given when justice so requires, MCR 2.118; *Terhaar v Hoekwater*, 182 Mich App 747, 751; 452 NW2d 905 (1995), the circuit court did not violate this rule in limiting plaintiff's amendment to state claims. Plaintiff's amended complaint filed on March 31, 2003, was different then the one presented in its motion for an amended complaint and the one it presented at the motion hearing. With respect to claims not raised in the motion, but argued at the hearing, these claims were not stated in writing with particularity, and were therefore not properly within the motion to amend the complaint. See MCR 2.119. The circuit court also preserved plaintiff's right to seek to amend to add federal claims once it had ruled on the pending motions for summary disposition or to bring another claim. And, the circuit court's final order was given with the understanding that it reserved adjudication of damages for the pending federal district court claims against defendants. The circuit court did not abuse its discretion in striking plaintiff's federal claims and only allowing the amended complaint to allege state claims, see *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997), citing *Dacon v Transue*, 441 Mich 315, 328; 490 NW2d 369 (1992); *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 658; 213 NW2d 134 (1973), particularly when defendants may have been prejudiced if the federal court claims were allowed and plaintiff suffered no prejudice.

Affirmed.[8]

/s/ Michael J. Talbot
/s/ Kathleen Jansen
/s/ Hilda R. Gage

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[8] Lincoln Park has requested that sanctions be imposed against plaintiff for a vexatious appeal. MCR 7.216(C)(1) governs sanctions requested for a vexatious appeal. MCR 7.216(C)(1) indicates that a motion for sanctions must be filed pursuant to MCR 7.211(C)(8). And MCR 7.211(C)(8) provides that a request for sanctions must be made by motion; a brief on appeal is insufficient to request sanctions. There is no indication that Lincoln Park has separately filed a motion for sanctions at the appellate level. Moreover, no appropriate legal authority was cited to support sanctions. Therefore, Lincoln Park's request for sanctions is denied.

APPENDIX B

Court of Appeals, State of Michigan

Docket No.250616
LC No.01-143011-NI

[Filed June 17, 2005]

Dorothy Jones	)
	)
v	)
	)
Aaron Reynolds	)
	)

ORDER

The Court orders that the motion for reconsideration is DENIED.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

June 17, 2005 /s/ Sandra Schultz Mengel
Date Chief Clerk

APPENDIX C

Michigan Supreme Court
Lansing, Michigan

SC No.: 129133

[Filed February 27, 2006]

DOROTHY JONES, as Personal Representative of the Estate of DENISE MICHELLE JONES, Deceased,
Plaintiff-Appellant,

v

AARON REYNOLDS, MUSTAPHA ATAT, a/k/a CRAZY MOE MUSTAPHA, a/k/a MOE ATAT, and MARSHA DESIREE HUMPHREY,
Defendants,

and

CITY OF LINCOLN PARK, WILLIAM KISH III, JOSEPH LAVIS, DOUGLAS MUNCY, and MOHAMED NASSER,
Defendants-Appellees.

ORDER

On order of the Court, the application for leave to appeal the April 7, 2005 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions should be reviewed by this Court.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 27, 2006 /s/ Corbin R. Davis
Clerk

No. 06-529

FILED
DEC 20 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

DOROTHY JONES, as personal representative of the estate of Denise Michelle Jones, deceased,

Petitioner,

v.

WILLIAM KISH, III; Joseph Lavis; Douglas Muncey; and Mohamed Nasser,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF FOR PETITIONER

I. There are several compelling reasons to review.

The police officers overlook several compelling reasons to review this case. In addition to the conflict among the federal circuits, this Court is urged to accept this Petition and intervene because the identical companion case of Rodney Ricks and Eric Draw against these police officers is currently pending in the Sixth Circuit, Case #06-1959. The Sixth Circuit rules of court require the Sixth Circuit to apply the decision of the present case, as binding precedent, if this court does not intervene and overrule the conflicting legal decision:

> **"6 Cir. I.O.P. 206(c) Published Opinions Binding. Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court en banc consideration is required to overrule a published opinion of the court."**

Petitioner's published matter was rejected by the Sixth Circuit's en banc court. The Sixth Circuit has long adhered to the "venerable principle" that a prior published decision remains controlling ***unless*** overturned by an *inconsistent* decision of the United States Supreme Court **or** by the Sixth Circuit itself sitting en banc. *Schoenberger v. Russell*, 290 F.3d 831, 841 (6th Cir. 2002); *United States v. Smith*, 73 F.3d 1414, 1418 (6th Cir. 1996); 6th Cir. R. 206(c). This Court should exercise its supervisory power and responsibility to intervene to resolve the conflict among the circuits. Moreover, Petitioner will not have a proper proceeding for redress as required by 42 U.S.C. § 1983:

> **"Every person who, *'under color of'* any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the *deprivation of any rights*, privileges, or immunities *secured by the Constitution and laws, shall be liable to the party***

injured in an action at law, suit in equity, or other proper proceeding for redress."

The important legal issues presented here emanate from the plain language of § 1983. The officers ignore the plain language. This Court's decision in *Deshaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989), did not and cannot change or abrogate the plain meaning of the statute. Petitioner is improperly without a state remedy since her state law claims were dismissed on State law grounds, *cf. Hudson v. Palmer*, 468 U.S. 517, 534-536 (1984). Indeed, in *Monroe v. Pape*, 365 U.S. 167 (1961), Justice Douglas identified the purposes of § 1983 as: **(1) overriding certain kinds of state law; (2) providing a remedy was inadequate; *and* (3) providing a federal remedy where the state remedy, though adequate in theory, was not available in practice.** Justice Douglas then concluded that "the federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id. at 183.* State law is not a defense to claims brought against governmental agencies or officers under federal civil rights statutes. *Martinez v. California*, 444 U.S. 277, 285 n.11 (1980); *Rushing v. Wayne County*, 436 Mich. 247, 462 N.W.2d 23 (1990). The Sixth Circuit's legal rule that assumption of risk is a defense to criminal conduct in a § 1983 claim is first impression. Petitioner requests review because she was deprived of her mandated remedy under § 1983 to redress her guaranteed constitutional right to life and bodily integrity.

II. The Sixth Circuit's conflict with other federal circuits warrants Supreme Court review to resolve whether words and presence of police officers facilitating illegal drag race and felony gambling is sufficient to constitute affirmative state action.

The officers incorrectly assert that the Sixth Circuit did not properly apply its "danger creation exception." *Res. App. 10.* The applicability of a legal doctrine is a question of law that this court reviews de novo. *People v. Thousand*, 465 Mich. 149, 156, 631 N.W.2d 694 (2001); *First Option of Chicago v. Kaplan*, 514 U.S. 938 (1995). Further, nowhere does § 1983, this Court's prior decisions, or the Fourteenth Amendment

authorize the "state created danger doctrine." This Court should review the legal effect of the state created danger doctrine to the circumstances of this case. The officers cite one paragraph in the petitioner's complaint to *falsely* suggest that this is a failure to protect claim, *but cannot cite any argument in the courts below* in support. Rather, petitioner pointedly argued she has not claimed the officers failed to stop the illegal drag race. Appellees stipulated to the facts presented here. *Ct. App. Reply Brief p. 1.* Further, the officers' candor is disturbing because material paragraphs of the complaint were argued below – "Officers . . . purposefully drove their police vehicles into a local party store parking lot so as to use their vehicles to facilitate, incite, and encourage the drag race and did so in the manner stated herein." *Ct. App. JA p. 244 ¶ 27.* Petitioner's complaint also states the officers "facilitated and encouraged the drag race by telling the organizers and participants to continue with the drag race because they were not there to arrest anyone." *Ct. App. JA p. 247 ¶¶ 44 & 45.* And, the "Officers . . . became participants of the drag race by telling the drag racers to proceed." *Ct. App. JA p. 349 ¶ 56.* Further, the Petitioner does not claim any liability or rights through the Michigan criminal drag race (MCLA 257.626a) and gambling (18 U.S.C. 1950) statutes, except to show the officers actions were illegal. Moreover, Petitioner's complaint stated "officers . . . exercised their authority as police officers to deprive the decedent of her fundamental right to life and liberty as described by the above acts and omissions of the defendants. This deprivation violated the decedent's rights under . . . Fourteenth Amendment of the United States Constitution." *Ct. App. JA p. 252.* Contrary to the police officers' assertion in a § 1983 action, the petitioner must prove that the official acted 'under color of law' and caused an injury to his constitutional or federal rights. *Monroe v. Pape*, 365 U.S. 167 (1961). *Petitioner's Sixth Circuit brief and en banc request urged the lower court to apply the plain language of* § 1983 to eliminate the conflict among the *Federal Circuits. Please see Ct. App. Appellant's Brief p. 12-15. – "The statutory language of 42 U.S.C. section 1983 provides a remedy to redress a deprivation of federal rights which takes place 'under color of' state, local, territorial, or District of Columbia law. A*

police ... ver acts under color of law even though in the course of his duties, he violates the law." Citing Monroe, supra. Respondents are being disingenuous about the history and arguments of this case to thwart the necessary conflict review. Indeed, there is no dispute about the facts. *Pet. App. at 15 and Pet. App. 24.* The officers conveniently overlook the Sixth Circuit's conflicting legal decision – "[B]ecause Jones has failed to establish a cognizable "affirmative act," we must reject her claim against the officers as a matter of law." *Pet. App. 19-20.* The Fourteenth Amendment did not just place a restraint on the States' power to physically act. It would be illogical to limit the restraint on the States' power to affirmatively act to unlawful physical or written manifestations. After all States issue verbal and written orders which affect the rights of People. The Fourteenth Amendment stripped the States of all power to deprive any person of life, liberty or property by arbitrary or oppressive action – such action is never due process of law. Nowhere does the Fourteenth Amendment limit the restraint on physical or written action. Indeed, Courts routinely find through application of the Fourteenth Amendment written words in legislation unconstitutional.

III. Settling the dispute among the federal circuits.

A. The Sixth Circuit's decision conflicts with the Second, Fourth and Ninth Circuits that words and presence constitute affirmative state action.

Sadly, the officers incorrectly distinguish the conflicting decisions of the Second, Fourth and Ninth Circuits by misstating the Petitioner's claim is only based on "respondents' presence at the scene of the drag race." *Res. p. 17.* Officers facilitated and encouraged illegal drag racing and gambling that killed Jones. In the courts below the officers stipulated to Petitioner's facts. *Ct. App. JA 1448.* Judicial admissions are binding on the parties for purposes of the case, including appeals. *Ferguson v. Neighborhood Housing Services of Cleveland, Inc.*, 780 F.2d 551 (6th Cir. 1986). Furthermore, contrary to the officers' assertion, the high school coach in *Meeker* did not [employ] a private party. *Res. p. 17.* Rather,

Meeker v. Edmundson, 415 F.3d 317 (4th Cir. 2005), held that words by a high school coach that initiated and encouraged repeat beating of student by other members of wrestling team constituted state action. The *Meeker* Court stated – "Moreover, it is crystal clear that *if* Meeker can prove, as he alleges, that Coach *Edmundson "instituted, permitted, endorsed, encouraged, [and] facilitated"* the beatings, *Edmundson* ***cannot*** *escape liability simply because he did not administer the beatings with his own hands."* (emphasis added). Meeker *at 322*. Like *Meeker* the respondents acting in the capacity of law enforcement officers facilitating and encouraging the very crimes that killed Jones, should not be allowed to escape liability simply because they were not driving the drag race vehicle themselves.

The police officers omit that they augmented the decision of Aaron Reynolds to call off the illegal drag race. The officers told Mr. Reynolds, the driver of the illegal drag race vehicle that struck and killed Jones that they "were not there to arrest anyone and go ahead with the race." Officer Nasser placed an illegal wager on the drag race. Similarly, *Kennedy v. City of Ridgefield, et al.*, 411 F.3d 1134 (9th Cir. 2006), held that a verbal promise by a state official to a victim that he would give the victim advance notice before contacting shooter about the victim's child molestation allegations against shooter, but failed to do so, and verbally assuring her that police would patrol the neighborhood after officer's contact, constituted affirmative state action. "Interpreting the facts in a light most favorable to Plaintiff, we conclude that Shields did in fact *augment* the danger Plaintiff and her husband faced and acted with deliberate indifference to a known or obvious danger." *Id. Kennedy at 1142-1143. The officer in Kennedy, like in the instant case, affirmatively acted through his words and presence which were sufficient to constitute affirmative state action.*

The police officers are also factually and legally mistaken about *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993). The respondent officers incorrectly state that in *Dwares* the "officers were directly liable for the *First* Amendment violation." *Res. p. 17.* Rather, *Dwares* was a Fourteenth Amendment substantive due process claim in the context § 1983 – aiding &

abetting and conspiracy. The Second Circuit held that New York City police officers *verbally* told "skinheads" that they would not interfere if "skinheads" beat up demonstrators burning a flag as long as it did not get out of control, such words constituted state action. There is clearly a need to resolve the conflict among the Federal Circuits over whether words and presence constitute state action.

B. Petitioner did not present a failure to protect claim.

The focus is affirmative state action because the conflict is the lower court's legal decision – **"[B]ecause Jones has failed to establish a cognizable "affirmative act," we must reject her claim against the officers as a matter of law."** *App.* 19-20. The definition of an "affirmative state action" under the state created danger doctrine cannot be any different than the very meaning of the words "under color of law" contained in § 1983. *Consistent with Deshaney the officers' criminal conduct is the basis to make out a Fourteenth Amendment substantive due process claim.* This Court has held that if state officer acted 'under color of' his legal authority, he could be sued under § 1983 even if his acts were unlawful under state law. *United States v. Classic*, 313 U.S. 919 (1941) that "misuse of power, possessed by virtue of state law, is action taken 'under color of state law.' 365 U.S. at 184. The officers' misplaced contention that "there was not intent or agreement to injure another" is irrelevant because § 1983 and the Fourteenth Amendment do not have an element of intent. *Res. p. 12 n.4. Parratt v. Taylor*, 421 U.S. 457 (1981). There is no basis for a legal distinction between state action 'under color of' law and state action in the state created danger doctrine. *Res. p. 11.* The Federal Circuits need clarification from this court whether the state created danger doctrine spawned post-*Deshaney* permissibly limits the form of state action. Did this court intend or anticipate that *Deshaney* would spawn the state created danger doctrine to be used as shield of absolute immunity to criminal police conduct? In effect the post-*Deshaney* state created danger doctrine abrogates the federal common law and circumvents § 1983. Indeed, if the County social worker in *Deshaney* had been present and verbally encouraged and facilitated poor Joshua's beatings by his father, the *Deshaney* court would not have ruled there was

no "state action" present. This begs the question, are words and presence of police officers facilitating and encouraging illegal drag racing resulting in death still actionable after *Deshaney* under the Fourteenth Amendment through § 1983.

C. Qualified immunity to deadly crimes must fail.

The Sixth Circuit state created danger doctrine impermissibly provided absolute immunity. Police officers incorrectly suggest the "state created danger doctrine" is an instrument of qualified immunity. The officers do not cite any authority that *Deshaney*, *supra*, *authorized the* use of judicial doctrines to provide ***absolute*** immunity. The officers' qualified immunity defense fails because the officers' criminal conduct is so obviously improper that no reasonable officer would expect to be shielded by qualified immunity. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable officer would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The reviewing court must consider whether a "reasonable officer" would recognize that his or her conduct violates that right under the circumstances faced, and in light of the law that existed at the time. *Saucier v. Katz*, 533 U.S. 194 at 202 (2001). Further, the officers' overlook the undisputable and well established principle that the Constitution protects the citizens liberty interest in his or her life and bodily security. *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 344 (1990). *See, e.g., Ingraham v. Wright*, 430 U.S. 651, 673 (1977) (paddling student); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) ("[t]he right to be free of state-occasioned damage to a person's bodily integrity is protected by the fourteenth amendment guarantee of due process."); *Nishiyama v. Dickson County*, 814 F.2d 277, 280 (6th Cir. 1987) (*en banc*). The Fourteenth Amendment specifies that no State shall "deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, Section 1. The officers are equally uninformed of the fact that this Court stated "We have emphasized time and again that the touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental

procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *Id. County of Sacramento v. Lewis* at 845-46 (1998). The officers do not provide any basis to entitle them to qualified immunity since their conduct was not "objectively reasonable." *See Wilson v. Layne*, 526 U.S. 603, 614 (1999) (*citing Anderson v. Creighton*, 483 U.S. 635, 639 (1987). A peace officer loses qualified immunity when the unlawfulness was "apparent," *Anderson v. Creighton*, 107 S.Ct. at 3039, and when there was not a "legitimate question" as to the lawfulness of the conduct. *Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12 (1985). ***Indeed, the Respondent police officers cannot show any authority under state law, state custom, or state usage to do what they did.*** *Qualified immunity fails.*

D. Respondents' res judicata failed below.

Contrary to the officers' assertion the lower courts rejected *res judicata* because the Michigan Courts authorized the plaintiffs' right to proceed on her federal claim in federal court:

> ***"And, the circuit court's final order was given with the understanding that it reserved adjudication of damages for the pending federal district court claims against defendants." Res. App. 33a p. 2.***

The basis for the Michigan Court of Appeals statement is the officers' agreement placed on the record, in open court, to allow the Petitioner to split her federal claims. *Ct. App. JA 1263.* In fact, in *Pierson Sand and Gravel Inc. v. Keeler Brass Company*, 460 Mich. 372, 596 N.W.2d 153 (1999), the Michigan Supreme Court has specifically adopted the Statement of Judgments to res judicata found in the Second Restatement of Judgments. § 26(1)(a) and (b) provide:

> "(a) *The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein; or*
>
> (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action."

Federal Courts have also adopted the restatement (Second) of judgments, where the "parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein." *Calderon Rosado v. General Electric Circuit Breakers, Inc.*, 805 F.2d 1085, 1087 (1st Cir. 1986) (*quoting* Restatement (Second) of Judgments 26(1)(a)). Thus, the federal claims are not precluded by the doctrine of res judicata.

IV. Respondents "Direct Injury" theory does not exist in the entire federal system.

The officers erroneously assert that the petitioner is now claiming a "direct injury theory." Contrary to officers' assertion the Petitioner argued *County of Sacramento v. Lewis*, 523 U.S. 83 (1998), below and cited the district court's finding of 'egregious' police misconduct. *Ct. App. Appellant's Brief p. 25.* **A "direct injury theory" does not exist in the entire federal system.** *Lewis* did not create a "direct injury theory" cause of action. The true teaching of *Lewis*, is the constitutional threshold conduct necessary in the context of a lawful police chase was "egregious" or "conscience shocking conduct." *Lewis* at 846. Indeed, the requisite level of culpability for a substantive due process violation under Fourteenth Amendment was found in favor of the petitioner by the District Court below – ***"[t]he alleged conduct of the officers that fateful evening is egregious."*** *Pet. App. 62.* The Sixth circuit discarded the finding of the district court and used a dubiously unrecognized standard of culpability, namely, to make **"a devil[ ] sick of sin" (Jones at 688, citing Wilfred Owen, Dulce Et Decorum Est (1918))**. *The Sixth Circuit would absurdly impanel a "devilish" judge and jury to sit in judgment of a constitutional tort.* ***This case, of course, is not a high speed chase and the Respondent police officers were not doing their job, pursuing criminals or standing by doing nothing.*** (emphasis added). Although police officers committing crimes is first impression, the conduct of the police officers' leaps across the Constitutional threshold for culpable conduct. **Pet. App. 5. Further, *Lewis* does not condone any kind of criminal conduct of government officials.** Of course, police officers facilitating and encouraging the commission of crimes is conscience shocking or egregious.

V. Respondents fail to address the assumption of risk defense in the context of a § 1983 claim.

The officers do not address this issue of first impression applied by the Sixth Circuit in this case. This Court has refused the application of the assumption of risk defense to federal statutes like § 1983 that were enacted to protect People. (Boiler Inspection Act – 45 U.S.C.S. §§ 22-34). *Great N.R. Co. v. Donaldson*, 246 U.S. 121, 38 S.Ct. 230 (1918). (Hours of Service Act – 45 U.S.C.S. § 61 et seq.) *Baltimore & O.R. Co. v. Wilson*, 242 U.S. 295 (1916); (FELA Act) *Union P.R. Co. v. Huxoll*, 245 U.S. 535, 38 S.Ct. 187 (1918); (Safety Appliance Act – 45 U.S.C.S. §§ 1-16) *Minneapolis v. Goneau*, 269 U.S. 406 (1926); Maritime law by 45 U.S.C.S. § 54; *Rivera v. Farrell Lines, Inc.*, 474 F.2d 255, *cert. den.*, 414 U.S. 822 (1973). This court is called upon to decide this issue of first impression in the context of the civil rights statute § 1983.

CONCLUSION

The Court should grant the petition for a writ of certiorari to settle the dispute among the Federal Circuits and decide issues of first impression, or preemptorily reverse the inconsistent published decision of the Sixth Circuit, or alternatively hold this Petition pending the Sixth Circuit decision in the case of *Ricks* and *Draw* (Case #06-1959).

Respectfully submitted,

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Dated: December 20, 2006